TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 258

CENTRAL PACIFIC RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, PETITIONERS,

vs.

COUNTY OF ALAMEDA, CHAS. W. HEYER, RALPH RICHMOND, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITION FOR CERTIORARI FILED JULY 24, 1931

CERTIORARI GRANTED OCTOBER 19, 1931

(36,072)

(36,072)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 258

CENTRAL PACIFIC RAILWAY COMPANY AND SOUTHERN PACIFIC COMPANY, PETITIONERS,

vs.

COUNTY OF ALAMEDA, CHAS. W. HEYER, RALPH RICHMOND, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Original	Print
Proceedings in supreme court of California	1	1
Caption.....(omitted in printing)..	1	
Record from superior court of Alameda County	2	1
Complaint	2	1
Answer and cross-complaint	14	8
Answer to cross-complaint	35	20
Findings of fact and conclusions of law	37	22
Judgment	53	31
Clerk's certificate.....(omitted in printing)..	64	
Notice of appeal	65	37
Bill of exceptions	66	37
Testimony of H. F. Harrold	67	38
Plaintiffs' Exhibit 6—Plat	70a	40
Defendants' Exhibit "B"—Proceedings relative to proposed road No. 247, embracing:		
(1) Petition for road No. 247, filed November 9, 1858	90	54

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1931

	Original	Print
(2) Field notes for road survey No. 247, filed May 27, 1859	92	55
(3) Plat of survey for road No. 247, filed May 27, 1859	98	60
Defendants' Exhibit "C"—Minutes of board of supervisors relative to proposed road No. 247, embracing:		
(1) Order of board of supervisors to notify land owners on petition for road No. 247, dated November 9, 1858	98	61
(2) Order for survey for road No. 247, dated February 8, 1859	99	61
(3) Order declaring road 247 public highway and directing road commissioners to open highway forthwith, dated May 3, 1859	100	62
Testimony of Israel Richards	101	62
G. W. Buttner	114	71
Frank L. King	126	79
George A. Posey	129	81
Defendants' Exhibit "D"—Topographic sheet of Pleasanton Quadrangle	132a	84
Defendants' Exhibit "BB," embracing:		
(1) Petition for abandoning county road No. 247, filed September 12, 1910	158	101
(2) Viewers' report abandonment of county road No. 247, Alameda County, filed March 6, 1911	162	103
(3) Resolution abandoning portion county road No. 47, filed March 27, 1911	165	104
Plaintiffs' Exhibit No. 18, embracing:		
(1) Petition for county road 689, filed June 19, 1865	167	106
(2) County surveyor's report upon petition for road 689	169	107
Testimony of H. F. Harrold (recalled)	171	108
Assignments of error	178	112
Specifications of insufficiency of evidence to sustain decision	181	114
Stipulation as to bill of exceptions	183	115
Certificate to bill of exceptions	183	115
Stipulation as to transcript	183	115
Order transferring cause from district court of appeal	186	116
Opinion by the court and judgment	187	117
Order denying rehearing	200	135
Clerk's certificate (omitted in printing)	201	
Order allowing certiorari	202	136

[fols. a-1] [Caption omitted]

[fol. 2]

IN SUPERIOR COURT OF ALAMEDA COUNTY, DEPT. 6

No. 83010

CENTRAL PACIFIC RAILWAY COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation, Plaintiffs,

vs.

COUNTY OF ALAMEDA, a Body Politic and Corporate; Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats, and William J. Hamilton, Members of the Board of Supervisors of the said County; John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow, and Frederick Stow, Defendants

COMPLAINT—Filed May 23, 1925

In Suit to Quiet Title, for Injunction, and for Restoration of Possession

The plaintiffs above named for cause of action against the above named defendants allege as follows, to-wit:

I

The plaintiff, Central Pacific Railway Company, is and [fol. 3] at all times herein mentioned it was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Utah and duly authorized to own, possess and control real property within the State of California.

II

The plaintiff, Southern Pacific Company, is and at all the times herein mentioned it was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Kentucky.

III

The defendant, the County of Alameda, is and at all the times herein mentioned it was a body politic and corporate duly organized and existing under and by virtue of laws of the State of California, and the defendants, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton are the duly qualified and acting members of the Board of Supervisors of said County of Alameda.

IV

The plaintiff, Central Pacific Railway Company, is the owner of the following described land, situate in the County of Alameda, State of California, to-wit:

[fol. 4] A strip of land 66 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Railway Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet; North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South 28 degrees 03½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Rail-
[fol. 5] way Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees

44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Railway Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said south-
[fol. 6] erly right of way line which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the said southerly right of way line which bears South 33 degrees 55¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, M. D. B. & M., and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point on the center line of County Road #4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line of track from Engineer Station 996 plus 70.0 of the Central Pacific Rail-
[fol. 7] way Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet

North of the southeast corner of Section 12, Township 4 South, Range 1 West, M. D. B. & M.; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line of the said Central Pacific Railway, said point being 200.0 feet at right angles northerly from center line of track at Engineer Station 998 plus 15.8.

A strip of land twenty (20) feet in width being ten (10) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point which bears North 10° 35′ West a distance of 200.0 feet at right angles from center line of track at Engineer Station 993 plus 02.5 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, said point also being 9712.5 feet West and 2244.2 feet North of the southeast corner of Section 12, Township 4 South, Range 1 West, M. D. B. & M.; thence South 69° 41′ East 200.8 feet; thence South 89° 52′ East, 249.5 feet; thence South 39° 41′ East 105.0 feet; thence North 88° 03′ East 223.15 feet; thence South 71° 48′ East 176.15 feet; thence North 85° 18′ East 263.97 feet; thence North 59° 50′ East 221.95 feet; thence South 77° 22′ East 159.52 feet; [fol. 8] thence North 58° 08′ East 161.87 feet to a point on the southerly right of way line of the said Central Pacific Railway, which is 200.0 feet at right angles southeasterly from center line of track at Engineer Station 1008 plus 52.4; thence leaving the right of way but reentering at a point on the said southerly right of way line which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1018 plus 72.3; thence inside the said right of way North 69° 10′ East 204.0 feet; thence South 62° 19′ East 138.5 feet; thence South 13° 19′ East 124.2 feet; thence South 5° 17′ West 48.6 feet, to a point on the said southerly right of way line, which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1023 plus 66.75; thence leaving right of way, but re-entering it at a point on the said southerly right of way line, which is 200.0 feet at right angles southerly from center line of track at Engineer Station 1093 plus 54.2; thence continuing inside the said right of way North 25° 53′ East 109.8 feet; thence North 82° 28′ East 143.8 feet; thence South 75° 33′ East 347.85 feet; thence South 69° 26′ East 237.0 feet; thence South 59° 55′ East 235.3 feet; thence

South 56° 03′ East 162.25 feet; thence South 49° 16′ East 363.3 feet; thence South 44° 40′ East 1211.55 feet; thence South 51° 43′ East 226.25 feet; thence South 67° 32′ East 192.36 feet; thence South 76° 03′ East 437.1 feet to a point [fol. 9] on the east line of Section 12, Township 4 South, Range 1 West, said point being North 761.5 feet from the southeast corner of said section 12; thence continuing on the same course 366.9 feet; thence South 84° 07′ East 261.5 feet; thence North 79° 03′ East 203.2 feet; thence North 69° 40′ East 652.0 feet; thence North 66° 28′ East 1013.6 feet; thence North 75° 17′ East 226.4 feet; thence North 87° 26′ East 297.5 feet; thence South 84° 48′ East 209.4 feet; thence South 79° 23′ East 323.2 feet; thence North 51° 26′ East 137.6 feet; thence South 69° 36′ East 733.55 feet; thence South 73° 21′ East 389.1 feet; thence South 81° 08′ East 340.77 feet; thence South 83° 32′ 30″ East 294.0 feet to a point on the east line of Section 7, Township 4 South, Range 1 East, and distant 941.4 feet North and 5195.5 feet East of the said southeast corner of Section 12, Township 4 South, Range 1 West, said point being also North 70.0 feet from Engineer Station 1184 plus 21.2 of the said Central Pacific Railway.

The above described land is a part of the right of way granted by the United States of America by the Acts of Congress approved July 1, 1862 and July 2, 1864 to Central Pacific Railroad Company of California, the predecessor in interest of the plaintiff, Central Pacific Railway Company.

[fol. 10]

V

By virtue of the lease from Central Pacific Railroad Company (predecessor in interest of Central Pacific Railway Company) to plaintiff, Southern Pacific Company, dated February 17, 1885, and by virtue of the lease from Central Pacific Railway Company to Southern Pacific Company dated March 3, 1923, Southern Pacific Company is and at all the times herein mentioned was entitled to the possession of said land described in paragraph IV hereof.

VI

The defendants claim some estate or interest in said parcel of land above particularly described adverse to

plaintiffs, but such claim of defendants is without any right whatever, and the said defendants have not, and any of them has not, any estate, right, title or interest whatsoever in or to the above described land or to any part thereof.

VII

The defendant, the County of Alameda, through the people and the inhabitants thereof, and the other defendants hereinabove named, without the permission or consent and against the will of the plaintiffs and of each of them and without any right or legal authority whatsoever, are now using and at divers times since the 26th day of May, [fol. 11] 1920, said County and its Board of Supervisors and the defendants sued herein by the fictitious names of John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow, have been using the above described land for highway or road purposes and have been trespassing upon said land—all, as plaintiffs are informed and believe and so allege, with the knowledge and by authority of the Board of Supervisors of said County, and they have thereby wrongfully excluded the plaintiffs and each of them from possession of said land and all thereof, and have deprived the plaintiffs and each of them of the possession or beneficial enjoyment of said land, and unless they are restrained by order of this Court from so dong, the defendants in this suit will continue to trespass upon said land and to wrongfully continue in the possession of the same and to exclude the plaintiffs and each of them from the possession or beneficial enjoyment thereof, and will proceed to, and ultimately will, acquire by adverse user a right or interest or permanent easement therein for highway or road purposes.

VIII

That the true names of the defendants sued herein by the names of John Doe Corporation, Richard Roe Corporation, [fol. 12] John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow are unknown to plaintiffs and for that reason said defendants are sued herein by the fictitious names aforesaid and plaintiffs

pray that when the true names of said defendants are ascertained they may be inserted herein in lieu of said fictitious names and that this complaint be amended accordingly.

Wherefore, plaintiffs being without any plain, speedy or adequate remedy at law, and without relief save in a court of equity where such matters are properly cognizable, pray:

(1st) That defendants and each of them be required to set forth the nature of their and of each of their adverse claims to the above described land and that all adverse claims of said defendants and of each of them may be determined by decree of this Court.

(2nd) That by said decree it be adjudged and determined that none of said defendants has any estate or interest whatsoever in or to said land hereinabove described in paragraph IV hereof, and that the plaintiff, Central Pacific Railway Company, has a good and valid title in fee simple to the whole thereof and that the plaintiff, Southern Pacific Company, as the lessee of said land from Central Pacific Railway Company, is entitled to the possession of said land and of all thereof.

[fol. 13] (3rd) That the defendants and all persons claiming through or under them or any of them be forever debarred and enjoined from asserting any claim whatever in or to said land or in or to any part thereof adverse to plaintiffs.

(4th) That the defendants and all persons claiming by, through or under them or either of them be hereafter restrained from using said land for any purpose or from entering upon said land or in any way interfering with the title or possession of plaintiffs or of either of them in or to said land and that the plaintiffs be restored to the possession of all of said land.

(5th) That plaintiffs have such other and further relief as to the Court may seem just and equitable, with costs of suit.

W. M. Singer, Frank C. Cleary, and Frank Thunen,
Attorneys for Plaintiffs.

Duly verified.

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF ALAMEDA COUNTY

ANSWER AND CROSS-COMPLAINT—Filed Jan. 5, 1926

Come now the above named defendants, County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the Board of Supervisors of the said County, answering the complaint of plaintiffs on file herein, admit, deny and allege as follows:

I

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph I of the said complaint of plaintiffs, and basing their denial on this ground deny the said allegation contained in paragraph I of said complaint.

II

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph II of said complaint of plaintiffs, and basing their denial on this ground deny the allegation contained in said paragraph II of said complaint.

[fol. 15]

III

Admit that the allegations contained in paragraph III of said complaint of plaintiffs on file herein are true.

IV

Deny that the plaintiff, Central Pacific Railway Company, is the owner of the following described land or any part thereof, situate in the County of Alameda, State of California, to-wit,

A strip of land 6 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Rail-

way Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet, North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South [fol. 16] 28 degrees 03-½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees 44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Railway Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West [fol. 17] outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11-¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said southerly right of way line which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course

North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the said southerly right of way line which bears South 33 degrees 55-¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, M. D. B. & M., [fol. 18] and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point on the center line of County Road #4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line or track from Engineer Station 996 plus 70.0 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet North of the southeast corner of Section 12, Township 4 South (Range 1 West, M. D. B. & M.; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line of the said Central Pacific Railway, said point being 200.0 feet at right angles northerly from central line of track at Engineer Station 998 plus 15.8.

A strip of land twenty (20) feet in width being ten (10) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point which bears North 10° 35′ West a distance of 200.0 feet at right angles from center line of track at Engineer Station 993 plus 02.5 of the Central Pacific Railway Company's main line leading from Oakland to [fol. 19] Tracy, said point also being 9712.5 feet West and 2244.2 feet North of the southeast corner of Section 12, Township 4 South Range 1 West, M. D. B. & M.; thence South 69° 41′ East 200.8 feet; thence South 89° 52′ East,

249.5 feet; thence South 39° 41′ East 105.0 feet; thence North 88° 03′ East 223.15 feet; thence South 71° 48′ East 176.15 feet; thence North 85° 18′ East 263.97 feet; thence North 59° 50′ East 221.95 feet; thence South 77° 22′ East 159.52 feet; thence North 58° 08′ East 161.87 feet to a point on the southerly right of way line of the said Central Pacific Railway, which is 200.0 feet at right angles southeasterly from center line of track at Engineer Station 1008 plus 52.4; thence leaving the right of way but re-entering at a point on the said southerly right of way line which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1018 plus 72.3; thence inside the said right of way North 69° 10′ East 204.0 feet; thence South 62° 19′ East 138.5 feet; thence South 13° 19′ East 124.2 feet; thence South 5° 17′ West 48.6 feet, to a point on the said southerly right of way line, which is 200.0 feet at right angles southwesterly from center line of track at Engineer Station 1023 plus 66.75; thence leaving right of way, but re-entering it at a point on the said southerly right of way line, which is 200.0 feet [fol. 20] at right angles southerly from center line of track at Engineer Station 1093 plus 54.2; thence continuing inside the said right of way North 25° 53′ East 109.8 feet; thence North 82° 28′ East 143.8 feet; thence South 75° 33′ East 347.85 feet; thence South 69° 26′ East 237.0 feet; thence South 59° 55′ East 235.3 feet; thence South 56° 03′ East 162.25 feet; thence South 49° 16′ East 363.3 feet; thence South 44° 40′ East 1211.55 feet; thence South 51° 43′ East 226.25 feet; thence South 67° 32′ East 192.36 feet; thence South 76° 03′ East 437.1 feet to a point on the east line of Section 12, Township 4 South (Range 1 West, said point being North 761.5 feet from the southeast corner of said Section 12; thence continuing on the same course 366.9 feet; thence South 84° 07′ East 261.5 feet; thence North 79° 03′ East 203.2 feet; thence North 69° 40′ East 652.0 feet; thence North 66° 28′ East 1013.6 feet; thence North 75° 17′ East 226.4 feet; thence North 87° 26′ East 297.5 feet; thence South 84° 48′ East 209.4 feet; thence South 79° 23′ East 323.2 feet; thence North 51° 26′ East 137.6 feet; thence South 69° 36′ East 733.55 feet; thence South 73° 21′ East 389.1 feet; thence South 81° 08′ East 340.77 feet; thence South 83° 32′ 30″ East 294.0 feet to a point on the east line of Section

7, Township 4 South, Range 1 East, and distant 941.4 feet [fol. 21] North and 5195.5 feet East of the said southeast corner of Section 12 Township 4 South, Range 1 West, said point being also North 70.0 feet from Engineer Station 1184 plus 21.2 of the said Central Pacific Railway. and in this connection allege that the defendant, County of Alameda is now and at all times mentioned in said complaint of plaintiffs was the owner of the said above described land and every part thereof.

V

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph IV of said complaint that the Central Pacific Railroad Company of California is the predecessor in interest of the plaintiff, Central Pacific Railway Company, and basing their denial on this ground deny the said allegation.

VI

Deny that the above described land or any part thereof is a part of the right of way granted by the United States of America by acts of Congress approved July 1, 1862 and July 2, 1864, or either of said acts or any other act or acts of Congress, to Central Pacific Railroad Company of California, the alleged predecessor in interest of the plaintiff, Central Pacific Railway Company.

[fol. 22]

VII

The said defendants and each of them have no information or belief upon the subject sufficient to enable them to answer the allegation contained in paragraph V of said complaint that Central Pacific Railroad Company, alleged predecessor in interest of Central Pacific Railway Company, executed a lease to plaintiff, Southern Pacific Company, dated February 17, 1885, and basing their denial on this ground deny the said allegation.

VIII

The said defendants and each of them have no information or belief upon the subject sufficient to enable them

to answer the allegation contained in paragraph V of said complaint that Central Pacific Railway Company executed a lease to Southern Pacific Company, dated March 3, 1923, and basing their denial on this ground deny the said allegation.

IX

Deny that by virtue of the alleged lease from Central Pacific Railroad Company, alleged predecessor in interest of Central Pacific Railway Company, to plaintiff, Southern Pacific Company, dated February 17, 1885, and by virtue of the alleged lease from Central Pacific Railway Company to Southern Pacific Company, dated March 3, [fol. 23] 1923, or by virtue of either of the alleged leases or any lease or leases, Southern Pacific Company is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the above described land or any part thereof, and in this connection allege that the defendant, County of Alameda, is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the land above described and every part thereof.

X

Deny that Southern Pacific Company is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the land above described or any portion thereof, and in this connection allege that the defendant, County of Alameda, is and at all times mentioned in said complaint of plaintiffs on file herein was entitled to the possession of the land above described and every part thereof.

XI

Admit that defendants claim some estate or interest in said parcel of land above particularly described adverse to plaintiffs, and deny that such claim of defendants is without any right whatever, and deny that said defendants and any of them have not any right, title or interest whatsoever in or to the above described land or to any [fol. 24] part thereof, and in this connection allege that the defendant, County of Alameda, is and at all times men-

tioned in the complaint of plaintiffs on file herein was the owner in fee simple of the said land above described and every part thereof.

XII

Admit that the defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named, without the permission or consent and against the will of the plaintiffs and each of them are now using, and at divers times since the 26th day of May, 1920, have been using the above described land and every part thereof for highway or road purposes.

XIII

Deny that the defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named or any of them are now using, and at divers times since the 26th day of May, 1920 have been using the above described land and every part thereof for highway or road purposes without any right or legal authority whatsoever, and in this connection allege that the defendant, County of Alameda, is and was at all times mentioned in complaint of plaintiffs on file herein the owner of the said above described land and every part thereof.

[fol. 25]

XIV

Deny that the said defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named or any of them have been trespassing upon the said land and every part thereof, and in this connection allege that the said defendant, County of Alameda, is the owner of the said land above described and every part thereof.

XV

Admit that the defendant, the County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named are now using and at divers times since the 26th day of May, 1920, have been using the above described land and every part thereof

for highway or road purposes with the knowledge and by the authority of the Board of Supervisors of said County.

XVI

Deny that the defendants and each or any of them have in any manner wrongfully excluded the plaintiffs or any of them from possession of said land and all thereof, and in this connection allege that the defendant, County of Alameda, is entitled to the possession of the land above described and every part thereof.

[fol. 26]

XVII

Deny that the said defendants and each or any of them have deprived the plaintiffs and each of them of the possession and beneficial enjoyment of said land and in this connection allege that the said County of Alameda is entitled to the beneficial enjoyment of the land above described and every part thereof.

Wherefore defendants and each of them pray judgment as hereinafter stated;

Second Defense

And for a second further and separate defense and answer to plaintiffs' complaint on file herein, defendants and each of them admit, deny and allege as follows:

I

Defendants refer specifically to the allegations, admissions and denials and each of them contained in paragraphs I, II, III, V, VI, VII, VIII, IX, X, XII, XV, XVI, and XVII of this answer as hereinabove set forth, and incorporate said allegations, admissions and denials and each of them into this second defense by reference to all intents and for all purposes as if fully set forth herein.

[fol. 27]

II

Deny that plaintiff, Central Pacific Railway Company, is the owner of the property hereinabove described in paragraph IV of this answer or any part thereof, and in

this connection allege that the defendant, County of Alameda, is, and at all times mentioned in complaint of plaintiffs on file herein was the owner of an easement and right of way for road and highway purposes in, along and upon said land and every part thereof.

III

Admit that defendants claim some estate or interest in said parcel of land above particularly described adverse to plaintiffs, and deny that said claim of defendants is without any right whatever, and deny that said defendants and any of them have not any right, title or interest whatsoever in or to the above described land or to any part thereof, and in this connection allege that the defendant, County of Alameda, is, and at all times mentioned in the complaint of plaintiffs on file herein was the owner of an easement and right of way for road and highway purposes in, along and upon said land and every part thereof.

IV

Deny that the defendant, County of Alameda, through [fol. 28] the people and the inhabitants thereof and the other defendants hereinabove named or any of them are now using and at divers times since the 26th day of May, 1920 have been using the above described land and every part thereof for highway or road purposes without any right, or legal authority whatsoever, and in this connection allege that the defendant, County of Alameda, is and was at all times mentioned in complaint of plaintiffs on file herein the owner of an easement and right of way for road purposes in, along and upon said land and every part thereof.

V

Deny that said defendant, County of Alameda, through the people and the inhabitants thereof and the other defendants hereinabove named or any of them have been trespassing upon said land and every part thereof, and in this connection allege that the defendant, County of Alameda, is the owner of an easement and right of way for road and highway purposes in, along and upon said land and every part thereof.

Wherefore defendants and each of them pray judgment as hereinafter stated;

Third Defense

And for a third further and separate defense and answer [fol. 29] to plaintiffs' complaint on file herein, defendants and each of them admit, deny and allege as follows:

I

Defendants refer specifically to the allegations, admissions and denials and each of them contained in paragraphs IX and X of this answer as hereinabove set forth, and incorporate said allegations, admissions and denials and each of them into this third defense by reference to all intents and for all purposes as if fully set forth herein.

II

Defendants refer specifically to the denials and each of them contained in paragraphs XIII, XIV and XVI of this answer as hereinabove set forth, and incorporate said denials and each of them into this third defense by reference and to all intents and purposes as if fully set forth herein, and allege in this connection that the said land hereinabove described is and for many years last past has been in use as a wagon and other public highway and highways, and in this connection further allege that such road and highway and roads and highways are necessary for the public accommodation.

[fol. 30] Wherefore defendants and each of them pray judgment as hereinafter stated;

Fourth Defense.

And for a fourth further and separate defense and answer to plaintiffs' complaint on file herein, defendants and each of them allege as follows:

I

Allege that the defendant, County of Alameda and the other defendants named in the complaint of plaintiffs on

file herein and the inhabitants of the said County of Alameda and each of them are now and have been for a long time past, to-wit, during the past twelve years and for many years prior thereto, in continuous, open and exclusive possession and occupation of the said land described in paragraph IV of plaintiffs' complaint on file herein and every part thereof for and as a public road and highway and public roads and highways and said defendants further allege that the defendant, County of Alameda, has expended great sums of money for the establishment, operation and maintenance of said road and highway and roads and highways over said land and every part thereof, which said expenditures by said County of Alameda have extended over a long period of years as aforesaid, and [fol. 31] said defendants further allege that all of the acts and things above mentioned in this fourth defense were and are done and continued with the full knowledge of and without any objection by or on behalf of the plaintiffs herein.

Wherefore defendants and each of them pray judgment as hereinafter stated;

Counter-Claim

And further answering the complaint of plaintiffs on file herein, said defendants, County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, members of the Board of Supervisors of the said County and each of them, cross-complain of the plaintiffs above named and each of them, and for cause of action against the said plaintiffs, allege as follows, to-wit:

I

The plaintiff, Central Pacific Railway Company, is and at all times mentioned herein, was a corporation duly organized and existing under and by virtue of law.

II

The plaintiff, Southern Pacific Company, is and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of law.

[fol. 32]

III

The defendant, the County of Alameda, is and at all times herein mentioned was, a body politic and corporate, duly organized and existing under and by virtue of the laws of the State of California, and Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, are the duly qualified and acting members of the Board of Supervisors of said County of Alameda.

IV

The defendant, the County of Alameda, is the owner in fee of that certain real property and every part thereof, situate in the County of Alameda, State of California, and more particularly described in paragraph IV, on page 2 of the within Answer, which said description contained in said paragraph IV, is specifically referred to and made a part hereof to all intents and for all purposes as if specifically set forth herein.

V

The said defendant, County of Alameda, is in the possession and entitled to the possession of the said land and every part thereof, hereinabove referred to and more particularly described in said paragraph IV on page 2 of the within Answer.

[fol. 33]

VI

The said plaintiffs and each of them claim some estate or interest in said real property hereinabove referred to and particularly described, adverse to defendants, but such claim of plaintiffs is without any right whatever and the said plaintiffs have not and either of them has not any estate, right, title or interest whatsoever in or to the said land hereinabove referred to and particularly described or to any part thereof.

Wherefore defendants being without any plain, speedy or adequate remedy at law and without relief, save in a court of equity, in which such matters are properly cognizable, pray:

1. That plaintiffs and each of them be required to set forth the nature of their and each of their adverse claims to the above described land and that all adverse claims of said plaintiffs and each of them may be determined by decree of this court.

2. That by said decree, it be adjudged and determined that the defendant, County of Alameda, is the owner in fee and entitled to the possession of the land and every part thereof, hereinbefore described in said paragraph IV on page 2 of the within Answer.

3. That the plaintiffs and each of them and all persons [fol. 34] claiming through or under them or either of them, be forever debarred and enjoined from asserting any claim or title whatever in or to said land or in or to any part thereof adverse to defendants; that defendants have such other and further relief as to the court may seem just and equitable.

Earl Warren, District Attorney in and for the County of Alameda, State of California; Ralph E. Hoyt, Assistant District Attorney in and for the County of Alameda, State of California; J. Paul St. Sure, Deputy District Attorney in and for the County of Alameda, State of California, Attorneys for Defendants, County of Alameda, Chas. W. Heyer, Ralph Richmond, John T. Mullins, Redmond C. Staats, and William J. Hamilton, Members of the Board of Supervisors of said County.

Duly verified.

[File endorsement omitted.]

[fol. 35] In Superior Court of Alameda County

Answer of Central Pacific Railway Company and Southern Pacific Company to Cross-complaint—Filed March 12, 1926

Cross-defendants Central Pacific Railway Company, a corporation, and Southern Pacific Company, a corporation, answering the cross-complaint (entitled counter-

claim) of the cross-complainants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, members of the Board of Supervisors of the said County:

I

Admit subdivisions I, II, and III of said cross-complaint.

II

Deny that the cross-complainant County of Alameda, or any of the cross-complainants, is the owner in fee or otherwise of any part whatsoever of that certain real property situated in the County of Alameda, State of California, and particularly described in paragraph IV, pages 2, 3, 4, and 5, of the answer and cross-complaint of the cross-complainants herein.

[fol. 36]

III

Deny that cross-complainant County of Alameda or any of the cross-complainants, is entitled to the possession of any part of the said land particularly described and last hereinabove referred to.

IV

Admit that these cross-defendants, and each of them, claims some estate and interest in the said real property described as aforesaid, which claim is adverse to the cross-complainants and all thereof, but these cross-defendants deny that such claims of these cross-defendants are without right and deny that these cross-defendants have not or that either of them has not any estate, right, title or interest whatsoever in or to the said land hereinabove and in said cross-complaint referred to and particularly described in paragraph IV of the answer of cross-complainants herein; and in this behalf these cross-defendants aver that Central Pacific Railway Company is the owner in fee, and entitled to the exclusive possession by and through its lessee and co-cross defendant Southern Pacific Company to the whole of said parcels of land particularly described in said paragraph IV of the answer of cross-

complainants herein, and referred to in said cross-complaint.

[fol. 37] Wherefore these cross-defendants pray that cross-complainants take nothing by their said cross-complaint and that cross-defendants have judgment against the cross-complainants as prayed in the complaint herein filed by these cross-defendants May 23, 1925.

W. M. Singer, Frank C. Cleary, and Frank Thunen,
Attorneys for said Cross-defendants.

Duly verified.

[File endorsement omitted.]

IN SUPERIOR COURT OF ALAMEDA COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Aug. 5, 1927.

This cause came on regularly for trial on October 11, 1926, before the court in Department No. 6, Honorable Eugene F. McDaniel, Judge presiding, without a jury, a jury trial having been waived by the respective parties. Plaintiffs appeared by their counsel, Frank Thunen, and the defendants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Mem-[fol. 38] bers of the Board of Supervisors of the said County, appeared by their counsel Earl Warren, District Attorney, Ralph E. Hoyt, Assistant District Attorney and J. Paul St. Sure, Chief Deputy District Attorney; and the action was dismissed as to the fictitiously designated defendants John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow. Said trial proceeded from day to day, evidence both oral and documentary being taken. Thereafter said cause was duly argued by counsel for the respective parties and submitted to the court for decision upon briefs thereafter to be filed. Now, the said briefs being in, and the case finally submitted, and the court being fully advised in the premises, makes and files its findings of fact as follows, to wit:

I

That plaintiff Central Pacific Railway Company is the owner in fee of a strip of land 400 feet in width, lying equally 200 feet on each side of the center line of main track of railroad in the County of Alameda and embracing within the outer boundaries of the said railroad right of way the following particularly described strips of land.

[fol. 39] Parcel "A."—A strip of land 66 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Railway Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-quarter section corner on the North line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet; North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South 28 degrees 03½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

Parcel "B."—A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Rail-

[fol. 40] way Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, M. D. B. & M.; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees 44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Rail-

way Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said southerly right of way line which is distant 200.0 feet [fol. 41] measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the said southerly right of way line which bears South 33 degrees 55¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, M. D. B. & M.; and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

Parcel "C."—A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to-wit:

Commencing at a point on the center line of County Road No. 4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line of track from Engineer Station 996 plus 70.0 of the Central Pacific Rail- [fol. 42] way Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet North of the southeast corner of Section 12, Township 4 South, Range 1 West, M. D. B. & M.; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line

of the said Central Pacific Railway, said point being 200.0 feet at right angles northerly from center line of track at Engineer Station 998 plus 15.8.

Parcel "D."—Commencing at the southeast corner of Section 12 T. 4 S., R. 1 W., M. D. B. & M.; thence north 76° 57′ 15″ West 9967.59 feet to a point, which bears north 10° 39′ 30″ West distant 200 feet from Engineer Station 992 plus 95.0 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the northerly right-of-way line of the said railway, as said right-of-way line was established by that certain map entitled "Map of The Western Pacific Railroad" and filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence south 69° 41′ East, 201.10 feet, South 89° 52′ East, 249.5 feet, South 39° 41′ East, 105.0 feet, north 88° 03′ East, 223.15 [fol. 43] feet, South 71° 48′ East, 176.15 feet, North 85° 18′ East, 263.97 feet, North 59° 50′ East, 221.95 feet, South 77° 22′ East, 159.52 feet, and North 58° 08′ East 95.87 feet to a point on the southerly right-of-way line of the said Central Pacific Railway, which bears South 39° 15′ 30″ East distant 200 feet on a radial line from Engineer Station 1007 plus 76.67 of the said original constructed line.

Parcel "E."—Commencing at the Southeast corner of Section 12, T. 4 S., R. 1 W., M. D. B. & M.; thence North 70° 38′ 04″ West 7776.4 feet to a point, which bears South 9° 30′ 30″ West distant 200 feet from Engineer Station 1018 plus 64.1 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right-of-way line of the said railway, as said right-of-way line was established by that certain map, entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 69° 10′ East, 207.06 feet; South 62° 19′ East, 138.5 feet; South 13° 19′ East, 124.2 feet, and South 5° 17′ West, 51.42 feet to a point on the said southerly right-of-way line of the said Central Pacific Railway, which bears South 41° 36′ 55″ [fol. 44] West distant 200 feet on a radial line from Engineer Station 1023 plus 58.05 of the said original constructed line.

Parcel "F."—Commencing at the southeast corner of Section 12, T. 4 S., R. 1 W., M. D. B. & M.; thence North 50° 32′ 04″ West 3861.26 feet to a point, which bears South 2° 39′ West 200 feet distant from Engineer Station 1093 plus 40.94 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right-of-way line of the said railway as said right-of-way line was established by that certain map entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 26° 05′ East, 105.36 feet; North 82° 40′ East, 143.8 feet; South 75° 21′ East, 347.85 feet; South 69° 14′ East, 237.0 feet; South 59° 43′ East, 235.3 feet; South 55° 51′ East, 162.25 feet; South 49° 04′ East, 363.3 feet; South 44° 29′ East, 1211.55 feet; South 51° 32′ East, 226.25 feet; South 67° 21′ East, 192.36 feet; South 75° 52′ East, 804.0 feet; South 83° 55′ East, 261.5 feet; North 79° 14′ East, 203.2 feet; North 69° 51′ East, 652.0 feet; North 66° 40′ East, 1013.6 feet; North 75° 28′ East, 226.4 feet; North 87° 36′ East, 297.5 [fol. 45] feet; South 84° 38′ East, 209.4 feet; South 79° 13′ East, 323.2 feet; North 51° 36′ 30″ East, 137.6 feet; South 69° 23′ 30″ East, 733.55 feet; South 73° 08′ 30″ East, 389.1 feet; South 80° 55′ 30″ East, 340.77 feet, and South 83° 19′ 30″ East, 294.00 feet, more or less, to a point on the east line of Section 7, Township 4 South, Range 1 East, Mt. Diablo Base and Meridian, which bears North 70.49 feet from Engineer Station 1183 plus 47.50 of the said original constructed line.

II

That the aforementioned railroad right of way, embracing the foregoing particularly described parcels of land is a part of the right of way granted to Central Pacific Railroad Company of California by Act of Congress approved July 1, 1862, entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the Government the use of the same for postal, military and other purposes." (12 Stat. 489) That plaintiff Central Pacific Railway Company is successor in title to Central Pacific Railroad Company of California

by successive corporate consolidations and by mesne conveyance.

[fol. 46] III

That the land within said 400 foot railroad right of way above mentioned, and embracing the strips of land hereinabove particularly described, was on July 1st, 1862, all unappropriated public land of the United States; and that said railroad contemplated by the said Act of Congress of July 1st, 1862, was definitely located and constructed by Central Pacific Railroad Company of California, and its successors within the time and in the manner prescribed by said act, with the center line of main track coincident with the center line of the 400 foot right of way above mentioned; and said railroad was duly accepted by the President of the United States on behalf of the Government; that said railroad was constructed as to the right of way herein mentioned in the years 1867 and 1868, and ever since said time said railroad has been in constant operation by plaintiffs and their predecessors as a common carrier of freight and passengers in a regular interstate and intrastate transportation business upon the line of its original construction; that from and since the year 1885 said railroad has been so operated by plaintiff Southern Pacific Company under lease from plaintiff Central Pacific Railway Company, and its predecessors and is now so operated by plaintiff Southern Pacific Company.

[fol. 47] IV

That roads for vehicular traffic claimed as public ways by the defendant County of Alameda embrace the area described hereinabove as parcels A, B, C, D, E and F.

Parcel A is a road beginning at the inter-county line between the Counties of Alameda and San Joaquin, and within the boundaries of the railroad right of way of plaintiff Central Pacific Railway Company, aforesaid, and extending westerly through the town of Midway, a station on said railroad line, 1000 feet more or less to a point of intersection with the southerly boundary line of the aforesaid railroad right of way.

Parcel B is a road extending from the aforesaid town of Midway westerly within the boundaries of the aforesaid

railroad right of way to a point of exit therefrom and intersection of the northerly line thereof, a distance of one mile, more or less.

Parcel C is a branch road extending from the intersection with Parcel D at a point near the center line of the aforesaid railroad right of way at Farwell, a station on said railroad line, and extending northerly a distance of 200 feet, more or less, to a point of intersection with the northerly boundary line of said railroad right of way.

[fol. 48] As to Parcels A. B, and C, the court finds that the defendant County of Alameda is not now, and never has been, the owner of any part of either Parcel A, B or C, above described, or of any interest therein or easement thereover, and that none of the said roads defined as parcels A, B, and C, is necessary for the public accommodation, and that the defendant County of Alameda has not expended great sums of money, or anything more than nominal amounts for the establishment, operation or maintenance of any part of any of said roads designated as parcels A, B, and C.

V

Parcels D. E and F are portions of a continuous highway extending from a point of intersection with the northerly boundary line of the aforesaid railroad right of way opposite the crossing of said railroad with Alameda Creek, in Niles Canyon, at or near the aforesaid station of Farwell, and extending easterly along the general course of Alameda Creek through Niles Canyon, and in considerable part within the boundaries of the aforesaid railroad right of way, to a point near Sunol, a station on said railroad right of way, a distance of three miles, more or less. Between Parcel D and Parcel E and between Parcel E and Parcel F the [fol. 49] said highway lies outside of the railroad right of way aforesaid; that the highway hereinabove described in part as Parcels D, E and F has existed in the location described since the year 1911, with the exception of a line change made within one year preceding the commencement of this action at the crossing of Alameda Creek in the first and second courses of Parcel F, above described; that said road as it existed prior to said line change is known and identified as county road survey No. 4974; that said road has been in constant use for vehicular traffic by the public

continuously since the year 1911; that the said Niles Canyon through which said road No. 4974 extends is narrow and rugged; that in the year 1859 defendant Alameda County surveyed and laid out through the said Niles Canyon, under Survey No. 247, a county road which was in the same year declared by the Board of Supervisors of said county to be a public highway; that the said survey No. 247 extended from Vallejo's Mill, in the County of Alameda, a point two miles, more or less, westerly of the aforesaid station of Farwell; thence easterly by way of Farwell up Alameda Creek through Niles Canyon to a point at or near Sunol; that for more than sixty years there has existed with the knowledge of plaintiffs and their predecessors a highway for ordinary [fol. 50] vehicular travel through Niles Canyon; but the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County road No. 4974, are a part of the present traveled road; but that upon adoption of county road No. 4974 in 1911 the pre-existing road for a distance of one-half mile more or less between Parcel E and Parcel F and within the railroad right of way aforesaid was abandoned by defendant Alameda County; that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with county road No. 4974, adopted by the Board of Supervisors of the defendant County of Alameda March 27, 1911, or whether the highway actually traveled prior to 1911 followed the line of survey No. 247 for any distance whatever. That the topographical, geographical and other physical features and conditions existing in the disputed portions of the right of way through Niles Canyon, viz: the narrowness of the canyon, proximity of Alameda Creek which in the winter season becomes a torrential stream sometimes capable of destroying bridges and roadways, and the steep sides of the canyon make it practically necessary to main- [fol. 51] tain the highway through the disputed territory because of the overwhelming difficulties to substitute a different route in those places where the road is within the 200 foot limit from the center line of main track of railroad. That the defendant County of Alameda has expended for improvements and maintenance of the highway through

Niles Canyon, the right of way of which includes parcels "D," "E" and "F," a large sum of money since 1911, to-wit, more than One Hundred Thousand ($100,000.00) Dollars. That the said highway through Niles Canyon is necessary for public accommodation.

Conclusions

The court concludes from the foregoing findings that plaintiffs are entitled to judgment quieting the title of Central Pacific Railway Company in fee to each of the three several Parcels of land designated A, B, and C, in the complaint and hereinabove particularly described, awarding exclusive possession to plaintiffs as to each of said Parcels A, B, and C, and enjoining and restraining the defendants and those claiming under the defendants from claiming any right, title or interest in or to any part of either Parcel A, B, or C, adverse to the plaintiffs; that plaintiffs are entitled to judgment further declaring the paramount title in [fol. 52] fee of plaintiff Central Pacific Railway Company as to Parcels D, E, and F, subject to an easement in favor of the defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes as laid out under said survey 4974, subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482) declaring: "And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road."

Let judgment be entered accordingly.

Eugene P. McDaniel, Judge Presiding.

Dated Aug. 4, 1927.

[fol. 53] [File endorsement omitted.]

IN SUPERIOR COURT OF ALAMEDA COUNTY

— JUDGMENT—Filed Aug. 19, 1927

This cause came on regularly for trial on October 11, 1926, before the court in Department No. 6, Honorable Eugene P. McDaniel, Judge presiding, without a jury, a jury trial having been waived by the respective parties. Plaintiffs appeared by their counsel Frank Thunen, and the defendants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the Board of Supervisors of the said County, appeared by their counsel Earl Warren, District Attorney, Ralph E. Hoyt, Assistant District Attorney and J. Paul St. Sure, Chief Deputy District Attorney; and the action was dismissed as to the fictitiously designated defendants John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow. Said trial proceeded from day to day, evidence both oral and documentary being taken. Thereafter said cause was duly argued by counsel orally [fol. 54] and briefed on behalf of the respective parties and submitted to the court for decision; and the court having considered the evidence and the oral and written arguments and being fully advised in the premises made and filed its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith:

Now, therefore, it is hereby ordered, adjudged and decreed that plaintiff Central Pacific Railway Company, a corporation, is the owner in fee of a strip of land 400 feet in width, lying equally 200 feet on each side of the center line of its main track of railroad in the County of Alameda and embracing within the outer boundaries of the said railroad right of way the following particularly described strips of land:

Parcel "A."—A strip of land 66 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the line dividing San Joaquin and Alameda Counties, distant thereon North 63.1 feet from Engineer Station 414 plus 70.2 of the Central Pacific Railway Company's main line from Oakland to Tracy, and which point is East 328.5 feet and North 2550.9 feet from the one-

quarter section corner on the North line of Section 5, Township 3 South, Range 4 East, Mount Diablo Base and Meri- [fol. 55] dian; thence North 66 degrees 47′ West, 315.9 feet; South 25 degrees 41′ West, 88.1 feet; South 68 degrees 55′ West, 49.6 feet; North 79 degrees 02′ West, 259.2 feet; and South 89 degrees 23′ West to a point on the southerly right of way line of the said Central Pacific Railway Company, which bears South 28 degrees 03½′ West, a distance of 200.0 feet at right angles from Engineer Station 405 plus 92.4.

Parcel "B."—A strip of land 40 feet in width, lying equally on each side of the following described center line:

Commencing at a point on the County Road leading from Sunol to Stockton by way of Patterson Pass which bears South 20 degrees 0′ West, 85.5 feet at right angles from Engineer Station 408 plus 31.7 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, said point of commencement being also North 2627.5 feet and West 300.75 feet from the one-quarter section corner on the North Line of Section 5, Township 3 South, Range 4 East, Mount Diablo Base and Meridian; thence North 64 degrees 27′ West, 203.6 feet; North 58 degrees 08′ West, 153.1 feet; North 56 degrees 36′ West, 150.6 feet; North 41 degrees 44′ West, 289.5 feet; North 31 degrees 19′ West, 193.3 feet; North 19 degrees 19′ West, 295.7 feet; North 6 degrees 31′ [fol. 56] West, 283.2 feet; North 1 degree 18′ East, 351.4 feet; and North 23 degrees 47′ West, 402.62 feet to a point on the southerly right of way line of the said Central Pacific Railway Company, which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 386 plus 53.6; thence continuing on the same course North 23 degrees 47′ West outside the right of way of the said Central Pacific Railway Company, 470.41 feet to a point on the said southerly right of way line which bears South 59 degrees 11¾′ West, a distance of 200.0 feet at right angles from Engineer Station 381 plus 17.3; thence continuing on the same course North 23 degrees 47′ West inside the said right of way 722.07 feet; North 35 degrees 22′ West, 284.3 feet; North 49 degrees 32′ West, 289.6 feet to a point on the said southerly right of way line which is distant 200.0 feet measured at right angles southwesterly from Engineer Station 368 plus 13.1; thence continuing on the same course North 49 degrees 32′ West outside the said right of way 565.0 feet and North 24 degrees 30′ West, 92.6 feet to a point on the

said southerly right of way line which bears South 33 degrees 55¾′ West, a distance of 200.0 feet at right angles from Engineer Station 360 plus 81.8; thence continuing on the same course inside the right of way line North 24 degrees 30′ West, 71.6 feet; North 3 degrees 04′ East, 177.8 [fol. 57] feet; North 20 degrees 24′ East, 41.9 feet, and North 37 degrees 31′ East, 163.2 feet to a point on the northerly right of way line of the said Central Pacific Railway Company, said point being North 1592.7 feet and East 63.9 feet of the corner common to Sections 29, 30, 31 and 32, Township 2 South, Range 4 East, Mount Diablo Base and Meridian; and 200.0 feet at right angles northeasterly from Engineer Station 359 plus 45.2.

Parcel "C".—A strip of land twelve (12) feet in width being six (6) feet on each side of a certain center line described as follows, to wit:

Commencing at a point on the center line of the County Road No. 4974 which bears North 10° 35′ West a distance of 59.9 feet northerly at right angles to center line of track from Engineer Station 996 plus 70.0 of the Central Pacific Railway Company's main line leading from Oakland to Tracy, and which point is 9325.4 feet West and 2174.0 feet North of the southeast corner of Section 12, Township 4 South, Range 1 West, Mount Diablo Base and Meridian; thence South 86° 29′ East 113.6 feet; thence North 52° 30′ East 82.3 feet; thence North 0° 31′ West 73.7 feet; thence North 38° 11′ West 57.8 feet to a point on the northerly right of way line of the said Central Pacific Railway, said [fol. 58] point being 200.0 feet at right angles northerly from center line of track at Engineer Station 998 plus 15.8.

Parcel "D".—Commencing at the southeast corner of Section 12, Township 4 South, Range 1 West, Mount Diablo Base and Meridian; thence north 76° 57′ 15″ West 9967.59 feet to a point, which bears north 10° 39′ 30″ West distant 200 feet from Engineer Station 992 plus 95.0 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the northerly right of way line of the said railway, as said right of way line was established by that certain map entitled "Map of The Western Pacific Railroad" and filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento,

California, said point being the point of beginning of the road to be described; thence south 69° 41′ East, 201.10 feet, South 89° 52′ East, 249.5 feet, South 39° 41′ East, 105.0 feet, north 88° 03′ East, 223.15 feet, South 71° 48′ East, 176.15 feet, North 85° 18′ East, 263.97 feet, North 59° 50′ East, 221.95 feet, South 77° 22′ East, 159.52 feet, and North 58° 08′ East 95.87 feet to a point on the southerly right of way line of the said Central Pacific Railway, which bears South 39° 15′ 30″ East distant 200 feet on a radial line from [fol. 59] Engineer Station 1007 plus 76.67 of the said original constructed line.

Parcel "E".—Commencing at the Southeast corner of Section 12, T. 4 S., R. 1 W., Mount Diablo Base and Meridian; thence North 70° 38′ 04″ West 7776.4 feet to a point, which bears South 9° 30′ 30″ West distant 200 feet from Engineer Station 1018 plus 64.1 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right of way line of the said railway, as said right of way line was established by that certain map entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 69° 10′ East, 207.06 feet; South 62° 19′ East, 138.5 feet; South 13° 19′ East, 124.2 feet, and South 5° 17′ West, 51.42 feet to a point on the said southerly right of way line of the said Central Pacific Railway, which bears South 41° 36′ 55″ West distant 200 feet on a radial line from Engineer Station 1023 plus 58.05 of the said original constructed line.

Parcel "F".—Commencing at the southeast corner of Section 12, T. 4 S., R. 1 W., Mount Diablo Base and Meridian; thence North 50° 32′ 04″ West 3861.26 feet to a [fol. 60] point, which bears South 2° 39′ West 200 feet distant from Engineer Station 1093 plus 40.94 of the original constructed line of the Central Pacific Railway Company's main line leading from Oakland to Tracy, on the southerly right of way line of the said railway as said right of way line was established by that certain map entitled "Map of The Western Pacific Railroad" filed October 12, 1869 with the clerk of the Sixth District Court at Sacramento, California, said point being the point of beginning of the road to be described; thence North 26° 05′ East, 105.36 feet;

North 82° 40′ East, 143.8 feet; South 75° 21′ East, 347.85 feet; South 69° 14′ East, 237.0 feet; South 59° 43′ East, 235.3 feet; South 55° 51′ East, 162.25 feet; South 49° 04′ East, 363.3 feet; South 44° 29′ East, 1211.55 feet; South 51° 32′ East, 226.25 feet; South 67° 21′ East, 192.36 feet; South 75° 52′ East, 804.0 feet; South 83° 55′ East, 261.5 feet; North 79° 14′ East, 203.2 feet; North 69° 51′ East, 652.0 feet; North 66° 40′ East, 1013.6 feet; North 75° 28′ East, 226.4 feet; North 87° 36′ East, 297.5 feet; South 84° 38′ East, 209.4 feet; South 79° 13′ East, 323.2 feet; North 51° 36′ 30″ East, 137.6 feet; South 69° 23′ 30″ East, 733.55 feet; South 73° 08′ 30″ East, 389.1 feet; South 80° 55′ 30″ East, 340.77 feet, and South 83° 19′ 30″ East, 294.00 feet, more or less, to a point on the east line of Section 7, Town-
[fol. 61] ship 4 South, Range 1 East, Mount Diablo Base and Meridian, which bears North 70.49 feet from Engineer Station 1183 plus 47.50 of the said original constructed line.

That plaintiff Central Pacific Railway Company, by and through its lessee and co-plaintiff Southern Pacific Company, a corporation, is entitled to the exclusive possession of the whole of said strips or parcels of land hereinabove designated as Parcel "A", Parcel "B" and Parcel "C", as against the defendants and each thereof, and all persons claiming or to claim by, through, or under the said defendants, or any thereof; that the defendants and all thereof, and all persons claiming or to claim under the defendants or any thereof are without any right, title or interest whatever in or to any part of any of said parcels or strips of land hereinabove designated as A, B and C, and are hereby enjoined and restrained from claiming any right, title or interest in or to any part of either Parcel A, Parcel B or Parcel C adverse to the plaintiffs.

That the title in fee of plaintiff Central Pacific Railway Company in and to Parcel D, Parcel E and Parcel F hereinabove designated is subject nevertheless to an easement in favor of the defendant County of Alameda by reason of necessity to maintain its present right of way for highway
[fol. 62] purposes over and upon the said Parcel D, Parcel E and Parcel F, and the whole thereof, subject, nevertheless, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482) declaring:

"And the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road." That pursuant to the terms of said act of Congress and under the paramount title of plaintiff Central Pacific Railway Company, plaintiffs may enter upon the whole or any part of all or any of said parcels of land hereinabove designated as Parcel D, Parcel E and Parcel F, and exclude the defend-
[fol. 63] ants and all thereof, and all persons claiming or to claim under the defendants or any thereof, from the possession of the whole or any part of all or any of said parcels hereinabove designated as Parcel D, Parcel E and Parcel F; provided, however, that plaintiffs shall first reconstruct at their own expense, or at the sole expense of either thereof, in the most favorable location, and in as perfect a manner as the original road, such portion or portions of said original road as may be repossessed by the plaintiffs to the exclusion of the defendants.

That no party hereto shall have costs as against any other party.

Dated Aug. 17, 1927.

Eugene P. McDaniel, Judge Presiding.

[File endorsement omitted.]

Entered August 19, 1927. Judgment Record No. 166, p. 389. Geo. E. Gross, County Clerk, by Etta Deetch, Deputy.

(Docketed:) Aug. 22, 1927. Geo. E. Gross, County Clerk, by Jno. T. Delaney, Deputy.

[fol. 64] Clerk's certificate to judgment roll omitted in printing.

[fol. 65] IN SUPERIOR COURT OF ALAMEDA COUNTY

NOTICE OF APPEAL—Filed Oct. 10, 1927

To the above-entitled court and to the clerk thereof; to the defendants above named and to their counsel:

Take notice that plaintiffs in the above entitled action hereby appeal to the Supreme Court of the State of California from the final judgment of the above entitled court dated August 17, 1927, and entered on August 19, 1927, in Volume 166 at page 389, Judgment Records of Alameda County, in so far as said judgment holds that the title in fee of plaintiff Central Pacific Railway Company in and to Parcel D, Parcel E and Parcel F in said judgment described is subject to an easement in favor of the defendant County of Alameda to maintain the present highway of said defendant over and upon the said three parcels of land, or any part thereof, and in so far as said judgment imposes any modification or qualification whatever upon the title or right of possession of these plaintiffs or either thereof.

Dated October 8, 1927.

Frank Thunen, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 66] IN SUPERIOR COURT OF ALAMEDA COUNTY

Plaintiffs' Bill of Exceptions—Filed April 25, 1928

This cause came on regularly for trial on October 11, 1926, before the court in Department No. 6, Honorable Eugene P. McDaniel, Judge presiding, without a jury, a jury trial having been waived by the respective parties. Plaintiffs appeared by their counsel Frank Thunen, and the defendants County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the Board of Supervisors of the said County, appeared by their counsel Earl Warren, District Attorney, Ralph E. Hoyt, Assistant District Attorney and J. Paul St. Sure,

Chief Deputy District Attorney; and the action was dismissed as to the fictitiously designated defendants John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow. Said trial proceeded from day to day, evidence both oral and documentary being taken. Thereafter said cause was duly argued by counsel orally and briefed on behalf of the respective parties and submitted to the court for decision; and the court having considered the evidence and the oral and written arguments and being fully advised in the premises made and [fol. 67] filed its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; thereupon judgment was duly given, filed and entered, being in part for plaintiffs as prayed and against the defendants, and in part as prayed by defendants and against plaintiffs. Plaintiffs having thereafter duly presented a motion to vacate and to set aside that part of the judgment adverse to plaintiffs and to enter a different judgment upon the findings, and said motion having been denied; and the plaintiffs having in due time and regularly presented their motion for a new trial, and said motion having been denied, the following bill of exceptions was duly proposed by plaintiffs and allowed and settled by the court for use on appeal from that part of said judgment adverse to plaintiffs and in favor of the defendants:

H. F. HARROLD, called on behalf of plaintiffs, testified:

Direct examination:

He is a civil engineer, residing in Decoto, Alameda County, California; that he had been employed by Southern Pacific Company on and off the last 20 years, and continuously for 7 years last past, his work being on the Western Division, including the line of railroad through Niles Canyon, involved in this action. He made a survey upon [fol. 68] the ground and a map therefrom (Plaintiffs' Exhibit 6 infra) of the line of railroad through Niles Canyon, also of the highway claimed by defendants as a county road and designated in the findings and judgment to the extent of its conflict with the railroad right of way as Parcels D, E and F. The map also shows the line of survey for original county road No. 247, adopted in 1859, as pro-

tracted by the witness from the original field notes (infra) on file in the office of the clerk of the Board of Supervisors of Alameda County. The railroad and right of way therefor as shown on Plaintiffs' Exhibit 6, and the center line of the highway, described in the findings and judgment as Parcels D, E, and F are made from actual surveys upon the ground. The line of original road No. 247 is protracted from the original notes of 1859, the termini, however, being checked by the witness by survey upon the ground, as to this the witness testified:

A. This is the other road—is simply a representation of the original surveyed road of 1859, No. 247, and I have located at each end of that map the beginning point and the ending point as recorded in this notice. Then I simply plotted the alignment notes as recorded and as shown by the dotted line. Apparently it does not follow the present road to any great extent.

[fol. 69] "Mr. Thunen:

Q. That is explained in the legend on the map?

A. That is explained on the map.

Mr. St. Sure: This map does not show any contour or any profile line, does it?

A. No topography, that is just a plan. There is nothing in the field notes showing the topography.

Mr. Thunen:

Q. Now, in saying that this map exhibits the conditions as you found them upon the ground, did you find this old road 247 on the ground as you have shown it by the broken line?

A. No sir, I have not.

Q. Where did you get that?

A. The field notes of 247, road No. 247. I will just read them to you (reading:) "Filed May 2, 1859. Beginning at a stake on the west side"——

Q. (Interrupting.) Never mind that going into detail. They are described on the plat. Where did you get those field notes?

A. They are on record in Alameda County in—Mr. Posey has them together with all road notes.

Q. We don't want to go into that, that is a part of your case.

Mr. St. Sure: Would be, yes.

A. You have the same thing.
Q. Survey for Mr. Posey?
A. Yes.

Mr. Thunen:

Q. But the red line mark or does that red line—that red [fol. 70] line indicates the center line of the traveled road as it exists there?
A. In Niles Canyon.
Q. As it exists today?
A. As it exists.
Q. Where did you get the data to establish your line on the plat?
A. By my survey?
Q. And you ran a line, is the course shown by its appropriate legend upon these four hundred feet, two hundred feet on the center line, and are likewise shown are they not?
A. Yes, sir.
Q. With their survey notes, I notice a great many field notes are shown on the map in connection with the establishment of the center line of the railroad. Did you make those notes in the field?
A. Yes, sir.
Q. They are as shown on the plat?
A. Yes, sir.

Mr. Thunen: We offer the plat in evidence as Plaintiffs' Exhibit No. —.
The Court (interrupting): 6, admitted."

(Here follows map, side folio 70a)



MAP IS TOO LARGE TO BE FILMED.

Cross-examination.

Mr. St. Sure:

Q. How long have you been familiar with this particular portion of this right of way of the Southern Pacific Company and the County road through Niles Canyon that we have been discussing here this morning?

A. Well, I have geen familiar with it all my life.

[fol. 71] Q. You live down in that part of the country, don't you?

A. Yes, sir.

Q. And in your capacity as an engineer, and assigned to work of maintaining or maintenance of way you also make certain surveys of the right of way in this division and you have been familiar with the existing right of way through Niles Canyon as claimed by the railroad company for some years?

A. Yes, sir.

Q. You made an actual survey of the center line of the railroad and the center line of the existing road through Niles Canyon, did you not?

A. Of the portions claimed by——

Q. (Interrupting.) Of the portions now in dispute?

A. Yes, sir.

Q. And you show upon that map which, I believe, is exhibit No. 7, upon these maps, 7, 8, and 9, you show a survey you made of that right of way? And certain other lines in addition to the center line of the railroad and the center line of the wagon road. May I ask what these lines represent? This line you state is the center line of the right of way?

A. Yes, sir.

Q. And these, lateral?

A. These are lines claimed as the right of way lines; in other words, a line which is drawn parallel to the center line of the right of way and two hundred feet on either side.

[fol. 72] Q. Two hundred feet on either side of the center line of the right of way?

A. Yes, sir.

Q. Do you show anywhere on that map the fence line of the Southern Pacific right of way?

A. No sir.

5

Q. Are you familiar with those?

A. In a general way.

Q. Where is their general relative position with regard to the center line of the right of way shown on this map?

Mr. Thunen: I object to that as immaterial, whether the right of way is fenced or whether it is unfenced.

Mr. St. Sure: If the Court is to rule that this line of testimony is immaterial the Court is preventing us from showing any other line but the claim of the Southern Pacific Company is correct; in other words, we are going to be limited in our proof as to whether or not the Southern Pacific has in fact established a right of way.

The Court: I think it would do no harm to permit certain conditions as shown upon the ground to be shown. I will overrule the objection. Read the question.

(Question read.)

A. That is a difficult question to answer directly because they have no relative——

Mr. St. Sure (interrupting): I will ask you—withdraw the question,—and I will ask you this question: Do the fence [fol. 73] lines of the Southern Pacific right of way as they now exist through Niles Canyon or that portion depicted upon this map correspond with those lines upon this map which you say represent a line two hundred feet on either side of the center line of the railroad?

A. Only in a few places.

Q. For how great a distance in these few places do they correspond?

A. At Farwell they are on the two hundred foot line for a distance of probably half a mile on both sides.

Q. Is that within——

A. (Interrupting.) A. Yes.

Q. (Continuing:) —the property described or shown upon this map? Do you know how long these fences have been in that position?

A. I do not.

Q. Now, over the remaining portion of the right of way as shown by this map in this place where the fence lines do*es* not correspond with this two hundred foot line, are the fences within the line shown upon this map or without

them, that is, are they within two hundred feet from the center line?

A. For the most part within. In fact, I don't know of any that are outside.

Q. Do you know how close these fences come to the center line, if any appreciable distance at any point in the canyon? [fol. 74] A. I have measured them at different places and some of them come to around fifty feet and some of them even less than that.

Q. And they have been in that condition for how long, if you know?

A. I don't know.

Q. How long have you been familiar with the territory through there?

A. In my present position, seven years, I have been quite familiar with the right of way condition. Before that, why, it is only in a general way that I would know where the fences might be.

Q. Has there been many changes in the fence line that you know of during the past seven years you have referred to?

A. Only one change at Farwell.

Q. What was the nature of that change at Farwell?

A. They changed the fence there for a distance of probably a thousand feet.

Q. What was the nature of that change?

A. Moved it up to the two hundred foot line on the southerly side of the track towards the creek.

Mr. St. Sure:

Q. So far as you know, so long as you have been connected with the Southern Pacific Company in the capacity of engineer and in work of the right of way, these fences have been in their present location with exception of the [fol. 75] portion near Farwell that has been moved as you have described.

A. It has.

Q. Do you know just when that change was made near Farwell?

A. I can't tell you exactly, but as I remember it about two years ago.

Q. How long?

A. About two years ago.

Q. Three?

A. Two or three years ago.

Q. Did you have any connection with the survey for that line at that time?

A. Yes, I staked the fence.

Q. You staked the fence. Could you just designate roughly on this map?

A. It is not on that map.

Q. This smaller map?

A. It is on one of the smaller maps.

Q. Just designate in pencil if you don't mind and if counsel has no objection the general location of the change in the fence.

A. Right over here at this point (indicating on the map).

The Court: How did you indicate it on the map?

Mr. St. Sure: Indicates it by two pencil marks and arrows pointing to them. And you fix these points how?

A. Guess.

Q. That is where the County road leaves the two hundred feet?

A. That is where the County road leaves the two hundred feet and here is where it enters (indicating).

[fol. 76] Q. And in that portion the fence is moved back in here, this line, there is no encroachment claimed by the Southern Pacific of the County road?

A. Down here a place in the canyon where the new fence is. The fences have been moved back two hundred feet from the line. There is one other place between our station at Brightside and Sunol where it has been moved on the other side of the tracks but the County is not interested in that.

Q. It hasn't anything——

A. (Interrupting.) It is on the outside of the track.

Q. On the opposite of where the road is?

A. Yes, sir.

The Court:

Q. The County road is on the south side of the track through the canyon. Does it cross?

A. It crosses just west of Sunol, and is on the north side for a distance of probably a quarter of a mile.

Mr. St. Sure: Yes.

The Court:

Q. And then it crosses back?

A. Yes, also on the north side just west of Farwell for a space of five or six hundred feet.

Mr. St. Sure: I think, if the Court please, if we can put this on the wall it will be better. Now, on this map, Mr. Harrold, which is a representation of your survey of four different lines, namely the center line of the traveled wagon [fol. 77] road, the road which is designated as 247; and the road claimed by the County of Alameda; and the center line of the railroad right of way; in running that line of the road known as or described on the map as road 247 do you remember what field notes you used in running that line?

A. 247?

Q. Yes, the old road, the one that was surveyed in 1859?

A. I didn't rerun that. That is simply a representation of the field notes on that map.

Q. Well, then, how did you achieve the transfer of that line from the field notes to this map? Just by plotting it according to the field notes?

A. No, sir, I will explain that to you: At this point, the beginning point of that road 247 which is described as being six chains, as being, as having a certain bearing on Bertrand Bedan's store at Sunol and also a live Oak tree. This was established by old time residents of Sunol as they showed me where this store was and here is—I found the live oak and also the road as originally built and started out at that point [illegible] then I go down to Niles and find the ending point of this road.

Q. How did you establish that?

A. Through the aid of one of the old residents, Mr. Richards, of Niles. He showed me the Vallejo Mills and [fol. 78] also the position of the store, and from which point I was able to determine the center of the present road is the center of the old road at that point, and I tied this in to our center line on our track which I had surveyed clear through. I was unable to plat them on this map. Then I took notes of the old road and I plotted them on the map and using both ends in here (indicating). There and at that end just simply plotted it.

Q. In other words, you got from the old residents down there an idea as to where these beginning and ending points

were and fixed them to your satisfaction as the points of beginning and ending of this road and then traced those upon this map of your center line of the right of way and then took the field notes and plotted out the road between. You made no attempt to survey that road?

A. No, sir.

Q. In the fixing of these center points or these beginning and ending points—does any portion of Bertrand Bedan's store stand today?

A. No, it does not.

Q. And you fixed that place, that little square you show upon the map there, from a statement of some of the old settlers there?

A. That is correct.

Q. Is the position of the store?

Mr. Thunen: Now, I beg your pardon. I think the witness testified that the old road is still there.

[fol. 79] Mr. St. Sure: I was coming to that. I would like to know how he knows it. You fix the first point, Bertrand Bedan's store, by information given you from old settlers and then you found a live oak tree—is that the only live oak tree around there?

A. Yes, and it corresponds exactly with the position as called for by the notes.

Q. And you took your starting place as the place fixed by the settlers?

A. Yes, sir.

Q. You say that there is evidence of a road having once existed there. Don't you show the beginning of this road on the map?

A. Yes, I remember after he showed it to me, that that was the road I had traveled on.

Q. You had traveled on that road formerly?

A. Yes, sir.

Q. How long since?

A. Oh, that was back over twenty-five years ago.

Mr. St. Sure:

Q. Now, Mr. Harrold, we can go back to this diagram, Plaintiffs' Exhibit No. 6, and we were discussing the line of road No. 247 as it appears on this map, and you said, I

believe, the manner in which you fixed the points of the beginning and ending of that line. Now, you mentioned that there was an appearance or a trace of the original road at the southeast portion of the road as it appears on the map, a point near Bertrand Bedan's store?

A. Yes, sir.

[fol. 80] Q. Did you follow the line of that road for any distance to determine whether or not in which direction it ran? and how far it was apparent?

A. Only as Mr. Bedan showed to me. I could see it cross the flat and it checked very closely with what I saw.

Q. Did you make a survey of it then?

A. No, I didn't make any survey.

Q. When you say you checked it closely for the line, you checked it very closely?

A. In a general way.

Q. This line here. And that is how far from the entrance to the land here in dispute, as it appears on this map?

A. I will have to measure that. About four thousand feet.

Q. That is roughly four-fifths of a mile?

A. Yes, sir.

Q. And this point at the other end of the canyon, at the western end, is there anything on the ground there that would have indicated the points that are given in the field notes of the original survey from which you fixed the point or direction on this map?

A. There is one point there, that is the southwest corner of Vallejo Mills.

Q. It still stands there?

A. Yes, it is there.

Q. What is the other point?

A. The other point is Scott's store. I remember in all [fol. 81] the reports they showed this, where that store was. I remember that.

Q. Was there anything on the ground?

A. No, there is nothing there except a fence. There is an old oleander bush which shows and it was established there at the same time.

Mr. St. Sure: That is some four thousand feet from the entrance to the property in dispute.

Q. This has been taken—this has been fixed by taking the line from the southwest corner of Vallejo Mill. The foundation I believe, is still there?

A. Yes, sir.

Q. And the line from the corner of Scott's store. You have placed it upon the map upon your own memory and the memory of Mr. Bedan—Mr. Richards?

A. Yes, and the two intersections came right in the center of the present roadway.

Q. The two intersections came right in the center of the present roadway?

A. Which would assure one that this is the starting point.

Mr. St. Sure: I ask that last part go out as being a conclusion.

The Court: It may stay in, it won't do any harm.

Mr. St Sure:

Q. Now, how far is that from the entrance to the property in dispute here?

[fol. 82] A. Well, it is probably two miles.

Q. Two miles. Now, in plotting out this line of the old road 247 and placing it between these two points which you fix in the manner you have testified, how do you fix the direction and distance as you go to Niles on the map?

A. Why, simply figuring on the traverse through there when you get through.

Q. You say you figured it. How did you figure, do you mean you based that as a correct direction and distance as appear upon this map, as the line of the old road No. 247?

A. Yes, as they are represented there in the field notes.

Q. You took it from the field notes?

A. The field notes, exactly.

Q. That were made in 1859?

A. 1859, that is it, exactly.

Q. What was the method of surveying as portrayed from those field notes, is it the same as you would do if you were surveying that road?

A. No, sir.

Q. It is by compass and point direction?

A. Very largely.

Q. Do you believe that you could resurvey that line as it appears from these field notes?

A. I don't know whether it could be resurveyed or not. It might be.

Q. At best these representations or figures were taken from the field notes and not an actual survey?

A. That is it.

[fol. 83] Q. Have you any idea or did you trace or follow or examine the place where this line as it appears on this map would come in Niles Canyon if it were actually surveyed as it appears here?

A. I didn't go out on the ground.

Q. You are familiar with Niles Canyon and the contour of that property?

A. Yes, sir.

Q. Just glance at this map. Where in your opinion would this road run in this place where it appears on the map, would it run in the canyon or in the creek or up the hillside?

A. Up the hillside.

Q. Is there any trace of a road there?

A. There is in one place, yes.

Q. Where is that?

A. That is at Farwell, right about in here. This road shown here follows pretty closely with the old road, so that probably the old road went up further at one time (indicating).

Q. Is there any other place that is near the mouth of the canyon, near where it opens up or broadens out?

A. No, but it is very close in there.

Mr. Thunen:

Q. Will you state to the court particularly which road, so we can get it into the record, point to which you are now referring. Pardon me for interrupting.

[fol. 84] A. Well, that is right at Farwell station for a distance of maybe a thousand feet easterly and the road is distinctly up towards the hillside of the canyon from the present location.

Mr. St. Sure: Now, I am asking—I withdraw the question. I am asking him in his opinion as an engineer and also a person familiar with the contour of that land whether or not the road which he has described and laid out upon this map, whether that road could be used as a road.

Mr. Thunen: I object to that question upon the ground that no foundation is laid for it. It has not been shown that there ever was a road on that line.

Mr. St. Sure: I am asking him in his opinion as an expert if there could be such a road.

The Court: I will overrule the objection, because he said he made this survey and fixed that road from the old field notes of the original survey.

Mr. St. Sure: Go ahead.

The Court: I want to bring the facts of the whole situation before the Court and I think it would be competent to testify whether or not this is a feasible roadway.

Mr. Thunen: If the question is limited to whether a road could be constructed on that line.

[fol. 85] The Court: I think that is the question. Read the question.

(Question read.)

A. It could.

By Mr. St. Sure:

Q. Does it go over the hillside or does it follow the canyon, that is the bed of the canyon, follow the course of the stream?

A. Goes over the points of the hillside and up at the creek.

Q. Goes over the points of the hill?

A. Yes.

Q. Doesn't skirt them, doesn't go around them?

A. No, goes over.

The Court:

Q. It is an up and down course?

A. Yes, would be more or less up and down, wouldn't go in the bottom of the creek at all.

"Mr. St. Sure:

Q. And would not it be the same line, the line that is shown here, the line which goes up and down over the hills would be the same distance over the creek there?

A. Yes, sir.

The Court:

Q. Is that all within the two hundred foot boundary?

A. Well, most of it. Some of it is only a small portion.

Mr. St. Sure:

Q. Do you know how close the slope of the hills on the north side of the railroad right of way comes to the center line of the right of way as it now exists?

[fol. 86] Mr. Thunen: I object to that unless counsel refers to some specific point of the right of way?

Mr. St. Sure: At the nearest point?

The Court: Do you mean at the narrowest part of the canyon, Mr. St. Sure?

Mr. St. Sure: Yes.

The Court: All right. I will allow it that way.

A. Just what point do you mean?

Mr. St. Sure:

Q. I am asking you, Mr. Harrold, can you indicate on the map the nearest part of the canyon, where the nearest part of the canyon is right about at this point (indicating)?

The Court: Make a mark.

Mr. Thunen: This point doesn't mean anything in the record.

Mr. St. Sure: How would you indicate that on the map?

A. We will call it engineer's station 1075.

Q. Engineer's station 1075, that appears upon this map. Plaintiffs' Exhibit 6?

A. Yes, sir.

Q. At that point how near does the northern wall or the northern slope of the canyon come to the center line of the right of way as it appears on that map in your opinion?

A. Well, of course, over there the center of the railroad is built on a ledge.

Q. Cut right into the side of a hill?

A. Cut right into the side of the hill.

[fol. 87] Q. This line of the road 247 would be further up the hill?

A. From that point.

Q. What is the distance between the right of way of the railroad and this line of 247?

A. Not very much, well, 1075—would be about one hundred and twenty-five feet.

Q. That would be sufficient to take it over the hill?

A. No, sir.

Q. What you mean is, the road would be further up the hill on the ledge, above the right of way of the railroad?

A. Yes, sir.

Q. Is there any trace of such a road on the side of the hill?

A. No.

Q. There would be if such a road existed?

A. If the road had existed there would have been a trace of it.

Q. And there is none along the side of the hill at that point?

A. No, sir."

Mr. St. Sure:

Q. On the opposite side of the center line of the right of way from the creek is a fence placed two hundred feet from the center line?

A. No, sir.

Q. Would it have been possible practically to put this fence on such right of way two hundred feet from the center line?

A. Yes, sir.

Q. As a matter of fact, they never were nor are not now on the two hundred foot line from the center line of the right of way?

A. No, sir.

[fol. 88] The Court:

Q. In other words, the fence did not mark the boundaries of the four hundred foot strip?

A. No, sir.

Mr. St. Sure: You mean claimed by the railroad?

Mr. Thunen: Now, that question calls for——

Mr. St. Sure (interrupting): To your knowledge the knowledge of the witness and his experience as an official of the company and also as a resident of that district.

Q. On that survey of road 247 that you plotted upon the map did you use any other fixed points that you had determined or could determine from the field notes other than those two at the beginning and ending of the line?

A. I have never determined any except two. Now, whether there are any in between that could be determined or not I don't know.

Q. Are there any referred to definitely in the field notes?

A. That I can't—If you will just let me look at them I can tell. There are a few white oak trees and things of that kind mentioned on my tracings but you would have to find them to establish your center line of your road from them if these could be found.

Q. You didn't make any effort to find any of them?

A. No, sir.

[fol. 89] Q. And if these could be found they would establish more accurately the line of this road would they not?

A. Absolutely.

Q. Without these points intervening between two terminal points the type of survey made as appears from the notes from which you drew this line is inaccurate and is considered inaccurate under present day methods of surveying, is it not?

A. Yes, they would have to retrace the road, to put it in itself in position, they would have to have these other points to check it up.

Q. And without compass and point direction the map would be rather inaccurate?

A. Without some tie in points, just by these two points——

Q. (Interrupting.) These are the only tie in points you have on that line which is for how long a distance, ten miles?

A. Eight to ten miles.

Defendants offered in evidence the record of the Board of Supervisors of the County of Alameda embracing the proceedings for the survey and opening of County Road No. 247, including the petition dated November 9, 1858 and the

field notes and plat of survey made in 1859. To this offer plaintiffs objected upon the ground that neither at the time of said proceedings nor at any time until some years after the title to the railroad right of way had been transferred [fol. 90] from the government to the Central Pacific Railroad Company of California was there any provision whereby the County of Alameda could have acquired a right of way over the public lands of the United States.

The Court: I think the field notes are admissible under the theory that the plaintiff introduced what purported to be a map based upon the field notes and you certainly would have a right to show what the field notes actually were if for no other purpose. Objection overruled—may be defendants' Exhibit B.

To this ruling plaintiffs reserve an exception, which for convenience is hereby designated as

Exception No. 1.

The proceedings referred to, embracing the petition, plat and field notes relative to County Road No. 247, are in words and figures following:

DEFENDANT'S EXHIBIT "B"

To the Honorable the Board of Supervisors of the County of Alameda:

The undersigned citizens of said County respectfully represent to the Board aforesaid, that a public highway commencing where the County Road intersects the Alameda Creek near Vallejo's Mill and following up said creek and intersecting the Stockton road so-called near the residence [fol. 91] of Bertrand Bedan is greatly needed for the convenience of the citizens of the County aforesaid, and they respectfully pray the Board aforesaid to locate a road between the two points above specified and to declare the same a public highway.

Benj. Williams, E. Chamcey, H. W. Smith, C. Cornell, E. Russell, Esq., E. H. Dyer.

Upon reading the foregoing petition and the Board being satisfied that the petitioners are citizens of the County of Alameda, it is now ordered by the Board here that —— —— be appointed to notify the parties owning or in possession

of the land over which said road shall be located of the pendency of the petition and to make report to the Board at its next meeting, on the — day of ——, ——.

(The following endorsement appears on this document:) "247. Petition for Road, Washington Township. Filed Nov. 9, 1858. H. C. Vesey, Clerk, by I. A. Amennan, Deputy Clerk."

[fol. 92] Field Notes

Begin at a stake on the west side of the road from the Mission of San Jose to Stockton from which the east gable of Bertrand Bedan's store bears S. 15½° W. about 6.00 chi. distant a white oak 18 inches diam. bears N. 44° 50′ E. 56 link and a live oak 16″ diam. bears N. 36¼° E. 45 Link; thence

Sta. 1. S. 86½° W. 6.00 chi. to station on S. E. Bank of Alisal creek.

2. S. 56¼° W. 3.00 chi. across creek. 7.00 chi. to station W. Oak. 15″ N. 22½° 86 lks. W. Oak. 15″ S. ½° W. 18 links.

3. S. 84½° W. 43.00 chi. to station from which W. oak 2 ft. N. ½° W. 122 links—W. Oak. 2 ft. N. 50° 50′ W. 98 lks.

4. N. 76¾° W. 26.00 chi. to sta. from which W. Oak 14″ diam. bears S. 15¼° E. 41 lks. W. Oak 36″ diam. bears N. 17° 10′ E. 223 links.

5. N. 65¾° W. 19.00 chi. to sta. from which W. Oak 9″ diam. bears N. 38° E. 75 links. W. Oak. 36″ diam. bears N. 8¾° E. 180 links.

6. S. 84° W. 5.08 chi. to sta. being a W. Oak 4″ diam.

7. S. 79¼° W. 4.73 chi. to sta. from which a live oak. 12″ diam bears S. 33 E. 44 lks.

8. S. 68¾° W. 11.50 chi. to sta. being a sycamore tree 2 ft. diam.

[fol. 93] 9. S. 69° W. 16.00 chs. to sta.

10. N. 82¾° W. 15.00 chi. to sta. from which a W. oak 7″ diam. bears N. 56° E 45 lks.

11. N. 70° W. 4.39 chi. to sta.

12. N. 51¾° W. 5.00 chi. to sta. from which a live oak 16″ diam. bears S. 39¼° E. 115 lks. A L. Oak 27″ diam. bears S. 86¼° 82 lks.

13. N. 44½° W. 23.39 chi. to sta. from which S. E. cor. of E. H. Dyers' house bears N. 40′ W. Live Oak 4 ft. diam. bears N. 69° E. 318 lks. Live Oak, 1 ft. diam. bears N. 75° E. 227 lks.

14. N. 62° W. 14.00 chi. to sta. from which a sycamore 27″ diam. bears S. 23° E. 154 lks. A live oak 15″ diam. bears N. 58½° W. 180 lks.

15. S. 85¾° 10.25 chi. to sta. from which a sycamore 2 ft. diam. bears S. 73¼° E. 85 lks. Oak 10″ diam. bears N. 25¼° E. 36 lks.

16. S. 50½° W. 5.00 chi. to sta.

17. S. 38° W. 7.75 chi. to sta. on point of rock.

18. S. 53° W. 4.83 chi. to sta. being a live oak 17″ diam.

19. S. 61½° W. 9.53 chi. to sta. a syc. tree 16″ diam. bears S. 43° E. 27 links.

20. S. 33¼° W. 9.00 chi. to sta.

21. S. 15¼° W. 9.20 chi. to sta. being an alder tree 13″ diam.

[fol. 94] 22. S. 59° 50′ W. 8.88 chi. to sta. a live oak 12″ diam. bears N. 4° E. 42 links. A syca. tree 2 ft. diam. bears S. 17½° W. 52 lks.

23. S. 78¼° W. 360 chi. to sta.

24. N. 64¼° W. 7.00 chi. to sta.

25. N. 28¼° W. 4.00 chi. to sta. from which a syc. 14″ diam. bears S. 21° W. 25 lks.

26. N. 12¼° W. 12.60 chi. to sta. from which a cotton wood 10″ diam. bears S. 81½° W. 56 lks. 2 Syc. tree- 2 ft. diam. bears N. 44½° W. 65 lks.

27. N. 10 E. 10.00 chi. to sta. from which the S. W. corner of Maxwell's log house bears N. 39½° E. 67 links.

28. N. 12¼° W. 6.50 chi. to sta.

29. N. 41½° W. 3.00 chi. to sta.

30. N. 64½° W. 3.50 chi. passes 50 lks. south of Bonner's House. 7 chi. to sta.

31. N. 78° W. 3.14 chi. to sta.

32. S. 78¼° W. 4.00 chi. to sta. from which a syc. tree 11″ diam. bears S. 30½° E. 53 lks. A syc. tree 11″ diam. bears N. 8½° E. 15 links.

33. S. 56¾° W. 5.00 chi. to sta.

34. S. 42¾° W. 7.00 chi. to sta.

35. S. 55½° W. 2.00 chi. to sta. on Rocky point.

36. S. 79¾° W. 4.00.

[fol. 95] 37. S. 84½° W. 9.00 chi. line passes 54 links S. of Wm. M. Bonner's house. 14.00 chi. cross north creek. 17.30 chi. to sta. from which an Oak 15″ diam. bears N. 82¾° E. 102 lks. Syc. 12″ diam. bears N. 88¾° E. 84 lks.

38. S. 83¼° W. 9.00 chi. to sta. from which an oak 27″ diam. bears N. 10½° W. 60 links. Syc. 8″ diam. bears N. 54½° W. 37 links.

39. S. 70¼° W. 3.00 chi. to sta.

40. S. 62° W. 2.00 chi. to sta.

41. S. 49½° W. 2.00 chi. to sta. from which an oak 2 ft. diam. bears N. 72½° W. 59 lks. Syc. 12″ diam. bears S. 60° W. 38 lks.

42. S. 42¼° 3.00 chi. to sta.

43. S. 18¼° W. 1.28 chi. to sta. being the northerly part of Mill Race Gate.

44. S. 16¾° W. 3.08 chi. to sta. being a cottonwood tree 8″ diam. 4 ft. S. of race.

45. S. 34° W. 596 chi. to sta. 12 ft. s. of Mill Race.

46. S. 41¾° W. 7.50 chi. to sta. from which A. Rankin's house on south side of River bears S. 27° E. A Sycamore tree, 20- diam. bears S. 46¼° E. 90 links.

47. S. 21¼° W. 2.00 chi. to sta.

48. S. 42¾° W. 4.90 chi. to sta. being a syc. 3″ diam.

49. S. 32¼° W. 8.30 chi. to sta.

[fol. 96] 50. S. 41¾° W. 4.00 chi. to sta.

51. S. 13½° W. 4.00 chi. to sta. 8 ft. E. of Race & 9 ft. N. of Waste gate.

52. S. 1¾° E. 2.00 chi. to sta.

53. S. 15° W. 6.00 chi. to sta. being a sycamore tree 3 ft. diam. near old crossing.

54. S. 37¼° W. 10.00 chi. to sta. from which an oak 10" diam. bears S. 8° E. 60 lks. An oak 14" diam. bears; N. 85° W. 31 lks.

55. S. 65¼° W. 11.00 chi. to sta. from which a sycamore tree 3 ft. diam. bears West 86 lks. An oak 11" diam. bears S. 19¾° E. 131 lks.

56. S. 52½° W. 12.35 chi. to sta. from which a sycamore 3 ft. diam. bears S. 62¾° W. 99 links. An alder 15" diam. bears S. 56¼- E. 85 lks.

57. S. 11° E. 0.90 chi. to N. side of creek. 2.20 chi. across creek. 5.00 chi. top of bank. 5.30 chi. to sta. from which an oak 14" diam. bears S. 59¾° W. 108 lks.

58. S. ½° W. 17.74 chi. to sta. for which a syc. 5 ft. diam. bears N. 85° 132 lks. An Oak, 16" diam. bears N. 4¼° E. 209 lks.

59. S. 23½° W. 10.05 chi. to sta. from which a syc. 3 Ft. diam. bears N. 60½° E. 188 lks. A syc. 2½ ft. diam. bears S. 25¾° W. 59 lks.

60. S. 47½° W. 7.17 chi. to sta.

[fol. 97] 61. S. 73¾ W. 13.85 chi. to sta. from which a syc. 4 ft. bears S. 6½° E. 29 links. A syc. 20" diam. bears N. 68° W, 85 links.

62. S. 51¾° W. 13.07 chi. to sta.

63. S. 75¼° W. 2.20 chi. to bank of creek. 3.40 chi. across creek. 7.30 chi. to sta. on E. side of road from Vallejo's Mill to the Mission of San Jose—S. W. Corner of Vallejo's mill bears N. 4¾° W. 360 lks. and the S. E. corner of Scott's store bears, N. 86¾° W. 191 links.

The courses are from the true mer. mag. var. 16° E.

The posts were set on the surveyed line being the center of the road at each angle and properly marked.

I hereby certify that the above are the true field notes and plat of a survey made by me by order of the Board of Supervisors of the County completed this day.

Jas. T. Stratton, Co. Surveyor, Alameda Co.

(The following endorsement appears on this document:) "247.4. Plat and Field notes of a survey of Road from Vallejo's Mill up the Alameda Creek to the Stockton Road [fol. 98] near Bertrand Bedon. Filed May 27, -859. H. N. Vesey, Clerk, by I. A. Amennan, Deputy Clk."

Copy of map of survey for Road No. 247 inserted here).

(Here follows map, side folio 98a)

MAP IS TOO LARGE TO BE FILMED.

Defendants offered in evidence photostatic copies of the petition for the establishing of said county road No 247 and also photostatic copies of portions of the minutes of the Board of Supervisors, which said copies of the minutes of the Board of Supervisors were admitted and marked defendants' Exhibit C and were in the words and figures following:

(Vol. No. 1, Nov. 9, 1858)

DEFENDANTS' EXHIBIT "6"

In the Matter of Roads and Highways

A petition being presented for a road in Washington Township, as follows: Commencing where the County Road intersects the Alameda Creek near Vallejo's Mill, and following up said creek, and intersecting the Stockton Road, so-called, near the residence of Bertrand Beden. On Motion E. A. Dyer is hereby appointed to notify parties owning the land or living on the line of said road to be and appear before this Board at their next regular meeting, to make objections, if any they have.

[fol. 99] (Vol. No. I, Feb. 8, 1859)

Tuesday afternoon, February 8, 1859.

Board met pursuant to adjournment. Present: Same members as in morning session.

In the Matter of a Road on Alameda Creek

A petition having been heretofore presented praying for a road commencing where the County Road intersects the Alameda Creek, near Vallejo's Mill, and following up said Creek, and intersecting the Stockton Road, so-called, near the residence of Bertrand Bedon, the consideration of the same came up on the report of the committee appointed to notify parties owning land, and the remonstrance of parties interested, and the Board, being fully advised, do now order, on motion, that the Co. Surveyor be and he hereby is ordered to survey out and locate the road according to the prayer of the petitioner.

247.4. Plat and Field Notes of a survey of Road from Vallejo's Mill up the Alameda Creek to the Stockton Road near Bertrand Bedan Rd., up Ala. Ck. from Niles to Sunol. Filed May 27, '59. H. N. Vesey, Clerk, by T. A. Amennan, Deputy Clk. 247.

[fol. 100] (Vol. I, May 3, 1859)

In the Matter of the Road from Vallejo's Mill up the Alameda Creek to the Stockton Road, Near Bertrand Bedon's

On motion, it is ordered by the Board that said Road as surveyed and located by the County Surveyor, and duly recorded herein, be and the same is hereby declared a Public Highway, of the width of four rods, and the Road Commissioner is hereby directed to have the same opened forthwith. And the original petition for said road is hereby continued until the next regular meeting of this Board, and all persons aggrieved shall present their petition for redress at said meeting.

Mr. Thunen: We move to strike out all the documents offered in support of road No. 247 upon the ground that they do not show that the road ever was actually opened or accepted by the County or that the road ever did actually exist as contemplated by that petition and by the survey.

"The Court: I suppose that will come later as a part of the testimony.

Mr. Thunen: That is all you are offering?

[fol. 101] Mr. St. Sure: In the way of documents. There will be testimony that the road was opened.

The Court: Objection overruled and the motion to strike out is denied.

To which ruling plaintiffs reserve an exception, which for convenience is hereby designated as Exception No. 2.

Israel Richards, called on behalf of defendants, testified that he resides in the Town of Niles at the westerly end of Niles Canyon, and that he has been familiar with the Niles Canyon since the year 1863 and before the time that the plaintiff railroad was constructed in the Niles Canyon.

"Q. So you have a recollection of Niles Canyon before the railroad came through?

A. Before the railroad came.

Q. I will ask you whether or not in your memory there was a wagon road through the Canyon prior to the railroad coming there?

Mr. St. Sure:

Q. Have you ever been over or did you ever traverse or travel the road through Niles Canyon before the railroad was built?

A. Yes, sir.

Q. On more than one occasion?

[fol. 102] A. Several, used to go on horseback most of the time.

Q. You already stated there was such a road. Do you recall the relative position of that road with reference to the creek?

A. It run from Niles just about directly where it starts in now, from the old road coming out from Hayward through Vallejo Mills and runs just about as it does now, I will say just below where the Spring Valley dam is, the first dam in the Canyon.

A. (Continuing:) In the Canyon and crossed the creek below the Spring Valley dam, not over two hundred yards I would think, to the south side and again ran up about a half a mile or maybe less than that and into the creek crossed to the Fernbrook side and came out over a little knoll where Fernbrook is at present, and then down over the knoll into the bottom of the creek and again followed that up along what is now the right of way of the Southern Pacific, possibly it might have been inside of their right of way, along the southerly side of the creek up to what we call the long crossing. That was a rather rough crossing, it wasn't deep, it was very shallow, but at the lower end where they started there was a number of boulders which they had to work around, it was the Long crossing, and went out on the other side, on the south side of the [fol. 103] creek again, and went possibly a half a mile or a quarter above that and crossed the creek to the northern side again and kept there completely on the northern side of Sunol, practically right alongside where the railroad

track is now, the road runs a great deal the same as it does now.

The Court: Better exhibit the map to him.

(Plaintiffs' Exhibit No. 6.)

Mr. St. Sure:

Q. You understand that this map——

A. (Interrupting.) I suppose it shows what they figure is the old County road?

Q. Yes, the old County road from Niles beginning at a point at Vallejo Mills?

The Court: Show him where the Canyon is.

A. I don't understand this. Is that the Mayberg side, this curve, what we call the Mayberg curve? Then the road came up, going over here; this is called Fernbrook and going over here down into the creek and followed along on the south side here to Mayberg's house. Mayberg had a house in there, and the Long Crossing would be right, right along in this corner (indicating).

Mr. Thunen: Pointing to the Mayberg curve as the Long Crossing.

A. Beyond the Mayberg curve just about, just a short distance between Mayberg, the easterly line is possibly fur- [fol. 104] ther back, and also through the cut, that was called the Long Crossing, and we crossed over to Maybergs from the northerly bank of the creek, we crossed here along up here and came up just, I think, beyond Mayberg's line.

Mr. St. Sure:

Q. Now, you referred to, when you began to describe the road, Mr. Richards, the place that you spoke of as Fernbrook, would you point that out on this map?

A. In here, as I understand it (indicating).

Q. On this map that shows—well, it would be in the neighborhood of the section of land between Section 10 and 110, that crossed right here, the line shown on the map directly to the right on that map?

A. We used to come down into the creek just before we got to Fernbrook. It crossed the creek and got out on steep

rise. It was not very high, possibly two hundred feet or maybee three and then came over and down the other side and pitched down into the creek, down in here and right along here (indicating).

Mr. St. Sure:

Q. Where you speak of that crossing—we start at Fernbrook now, could you take it step by step, as you remember the road as it existed—I call your attention to the map, this [fol. 105] shows the creek and this double line shows the creek and the red line shows the County road as it exists today and this line, this straight line, this line here shows the center line of the railroad as it exists today. Now have you in mind these three lines? This line here is the railroad line and here is the line of the creek. Can you slowly trace the road as you remember it, the old road from the point at Fernbrook, as you fixed Fernbrook on this map to the other end of the Canyon?

A. This is the Central Pacific Railroad Company?

Q. Yes.

A. This is the county road.

Q. Here is where the point begins. The road as it exists today does not show on this particular map. This red line is the road as it exists today and begins at that point on this map (indicating).

A. Oh, then, we have this here at Fernbrook.

Q. We indicate Fernbrook as about the point where the red line begins on this map.

A. This section line. Yes, they came down the hill there and followed along and crossed onto—I suppose they are little trails in red. I don't understand.

Q. Are you describing the old road or the existing road?

A. No, this road you have here, down until it crosses the creek at Mayberg's on Mayberg's side, is practically [fol. 106] the same road that we had in those days.

Q. You place Fernbrook beyond the Mayberg property?

A. The Mayberg property comes up over here, this runs across the creek, this road over here and over the bridge here, and this is Mayberg's and the creek. The road is used to run in the old days, it ran on the northerly side

of the creek until it got to the Long Crossing, and then it came over the stream into Mayberg's.

The Court: Make a mark where it crossed.

Mr. St. Sure:

Q. Where did it cross, as you remember?

A. At the Long Crossing and came over we will say, on this side, crosses into here (indicating).

Q. I will make a mark there where Mr. Richards places it, make an R, if I may, I will put it R1, with a cross on the map where Mr. Richards has placed where the old crossing merged into the Long Crossing that he has reference to. Mark that Long Crossing, the beginning, Mr. Richards?

A. It is pretty hard to tell, but the Long Crossing would be just about that curve, would come, would start just about——

The Court (interrupting): Put a mark two.

[fol. 107] A. We will call this the curve and down—the Long Crossing would be here, right in here.

The Court: Put R2 there.

A. For the point.

Mr. St. Sure:

Q. Make the Crossing R2, that is the relative position?

A. Practically the crossing. The road followed up on this side a ways and went down into the creek and crossed again and kept up entirely on that side. Now, it crosses over the Western Pacific Tunnel, this is the present line, I suppose, crosses the bridge over into the old road again. That road extended away down below that bridge and came down along in the creek and crossed in here somewhere (indicating).

The Court: Make that R3.

A. Yes, crossed here and ran down that line and then in here crossed the creek and came up on the right hand side.

Mr. St. Sure:

Q. Until what point?

A. Until you came into Sunol. This now is the bridge, crosses the creek, as I understand it, the bridge up there, and that bridge, there is a crossing, and the road came up to that point. They put a bridge in after they put the Mayberg road in here.

Q. You speak of the old road. Now the roads came together. Can we put a mark, point, where you believe [fol. 108] these two roads came together.

A. They came in here at this bridge.

The Court: R4.

Mr. St. Sure: R4.

A. Over this way, and this road was on that side and came down to the Long Crossing.

Q. From the point R4 where the bridge is now in your opinion and in your memory the old road and the present road were the same?

A. Just the same as it runs today?

Q. From there into Sunol?

A. Yes.

Cross-examination.

Mr. Thunen:

Q. Isn't it a fact, Mr. Richards, that the road was changed some thirteen years ago?

A. The present road?

Q. Yes.

A. The only change that there is, the two changes made in the road, the old road is as I have tried to describe it there.

Q. Yes.

A. One was from the crossing below the Spring Valley Dam; they took the northern side of the creek and cut around in the side of the hill that the Southern Pacific or the Central Pacific wouldn't take out, to fill their mole at the Oakland yard. I worked for them at that time. Then, after you cross, after you go by Fernbrook down [fol. 109] into the creek again they have built a bridge that we used to go around right under the Southern Pa-

cific tracks, they built a bridge across on the Mayberg side where his home was. Now, instead of going around the big crossing they cut up over the Western Pacific tunnel and cut around that bridge, that was above, quite a distance above where we crossed the creek onto the northern bank, on the old road.

Q. What was the total length approximately of the changes made in 1913 or thereabouts?

A. Well, it would be a little hard for me to tell the total for the reason that I was working at that time in the tower, from 1908 I have been steady in the tower. Before that I was in, on the County road, working at different times a great deal in the canyon, but they made a change in that, there is quite a change made.

Q. Made a number of changes, did they?

A. There is only two that I know of.

Mr. St. Sure: If the court please, upon that subject at that time the only changes referred to by the witness, he spoke of, being before you come to Fernbrook, and that would be the outside of the property now in dispute and the only change that he has referred to that is within the property he described around Mayberg.

[fol. 110] The Court: Called the "Long Crossing."

Mr. St. Sure: Yes, called the Long Crossing.

Mr. Thunen:

Q. Now, between Fernbrook and Sunol, how many, what was the, approximately, the length of the road the change made in 1913?

A. Between?

Q. Yes, between Fernbrook, as I understand it, Fernbrook is about the beginning of the red line shown on the map, the western end of it.

A. Well, say this is Fernbrook, you come down, come along—I suppose there are little curves, short turns in the road until you cross that bridge beyond the Mayberg side, that road line, where that red line would be now.

Q. Where was it, where did it go, where was it prior to 1913?

A. Why, we had in 1913, we had to come around on the Mayberg side. I think was way back of the crossing; I

wouldn't be positive now. But that old road ran along there, and now over here (indicating).

Q. That is opposite the Mayberg curve?

A. Yes. That Long Crossing comes in by what we call the Mayberg line, his land, his piece over there, and that used to go a little ways and then go down into the creek again, down a little steep hill, like a bank, eight or ten feet, and run along—go down to the creek where it crossed [fol. 111] and kept entirely then over there. At the present time it is entirely new and comes along by the Spring Valley flume and above the Western Pacific tracks and crosses over on the Western Pacific, what we call the little tunnel. The big tunnel is about in here and the little tunnel is here, up here, just before you get down into that bridge (indicating).

Q. The bridge?

A. Yes, the bridge crosses over to the northern bank, as we call it, and it goes clean through, the old road did at that time. The old road started and came over here running down in here and crossed in here and came down (indicating).

Q. How many times did you cross the creek in the old days between Fernbrook and Sunol?

A. Between Fernbrook and Sunol?

Q. Yes.

A. Twice.

Q. This crossing you have pointed out in that direction (indicating)?

A. I pointed out the Long Crossing, the crossing before you get to the bridge on that side of the Long Crossing, you go right along.

Q. Wasn't there a crossing up there from R1 to R2?

A. That is the Long Crossing.

Q. That is the Long Crossing?

A. That is the Long Crossing. There was afterwards, [fol. 112] after this old original road in here when it was washed out, came on the Southern Pacific side, it washed out, the road ran between the Southern Pacific fence and the creek. It washed out back there, there was a washout in there and I remember that Fred Froeck one night drove into the hole. The road cut across and made a crossing there and cut across down here again at the Long Crossing,

and then afterwards cut around by Mayberg's. That is along after this old road—that isn't—this red line don't mean the old road. It is practically the new road now.

Q. There were a number of little changes made from time to time on account of washouts, were there not?

A. Only one change I ever remember of in the main road was that change of the crossing on the Mayberg side.

Q. When did you first go through the Canyon on that old road?

A. Some time the latter part of 1863 or early in 1864.

Q. Did you go clear through the Canyon there?

A. No, not at first, I think three times we went up above what we called Captain Troth's place at that time.

Q. Where is that?

A. Right where the bridge crosses now. He was on the northern side. He had a home there at that bridge crossing.

[fol. 113] Q. Showing R4 on the Exhibit?

A. Yes, where the bridge crosses now on the Sunol side.

Q. When did you first go through the point you have just mentioned at Sunol, on the old road?

A. Why, it was sometime in 1864, along in—I could not be positive because I was a boy. We used to ride through on horseback sometimes, and we used to hunt up that road.

Q. Didn't you travel in the bed of the creek a good deal of the way?

A. No, sir, we didn't, in the bed of the creek. Most of our travel down in here was in the bed of the creek.

Q. This part (indicating)?

A. From Fernbrook down around until we got here to the Long Crossing, and then into the creek again, and crossed, and then we would be on high ground all the way up.

Q. Do you remember when the railroad was built?

A. You mean the Western Pacific?

Q. Yes; up there through the Canyon?

A. I wouldn't remember the date, 1864 or 65, along in there.

Q. You were in there at that time?

A. I was living there then and used to go up to the [fol. 114] Tunnel, above the top, up there where they was building it, Scott and his wife boarded men.

Mr. Thunen: That is all.

Redirect examination.

Mr. St. Sure:

Q. That old road di-n't go up over the hills, on the northern part or side of the Canyon, it didn't go over the hills?

A. No, sir; the only place it touched would be up at Fernbrook over near where we crossed the creek on to the Southern side when it went across the creek and came out right directly at Fernbrook and then right down again. Only went a little distance, possibly twice the length of this room and went down right into the low ground, again, to the bed of the creek, as we called it, because in high water the water would come up there and leave deposits on the place."

G. W. Buttner, called on behalf of the defendants, testified that he has resided in Alameda County since 1858; that during his youth his father had a ranch at Sunol and that he travelled through the Niles Canyon to Vallejo Mills at the opposite end of the canyon in the year 1862 or 1863, and before the Western Pacific Railroad was constructed. He [fol. 115] further testified that he is familiar with the Niles Canyon and with the wagon road and existing right of way line of the Southern Pacific in said canyon.

"Mr. St. Sure:

Q. Have you a recollection of the road through Niles Canyon prior to the time of the coming of the original Western Pacific Railroad?

A. Yes, sir.

Q. About what time or what year do you recall—withdraw that. Do you remember traveling on that road?

A. I do.

Q. When did you first travel on it if you remember?

A. I came down, we came down, my brother and I with my father, he brought some sacks of wheat down through Niles Canyon, used to come in a little express wagon, to be ground at Vallejo Mills.

Q. And you got on that road at Sunol at the end of the Canyon?

A. Yes, at Sunol.

Q. And Vallejo Mills was at the opposite end?

A. At the opposite end near Niles.

Q. And that is the place where you went to have the grain ground into flour?

A. Yes, sir.

Q. Do you remember what year you first made the trip through the canyon as you have described?

A. Well, I could not say now. It was before the railroad was built, about 1862 or 1863.

[fol. 116] Q. Did you make more than one trip before the coming——

A. (Interrupting.) Yes, every time the folks went down we went along.

Q. About how often was that as you remember?

A. Sometimes of course in the winter not quite so often, but in the summer time quite often.

Q. A couple of times a month or less or often.

A. More than that, maybe once a month.

Q. Were you familiar with the road that went through the canyon at that time?

A. Yes, sir.

Q. Are you familiar with the road as it exists in the canyon today?

A. I am.

Q. And are you also familiar with the line of the right of way of the Southern Pacific Company as it goes through the canyon today?

A. I am.

Q. And also the course of the stream in Niles Canyon, the stream, Alameda Creek?

A. Yes, sir.

Q. You have no doubt seen this map and you understand what this map represents?

A. Yes, sir.

Q. From this point where the red line begins until the point at the other side of the map where the red line ends is the property which is in dispute.

A. Yes, sir.

[fol. 117] Q. On this map the red line represents the existing center line of the existing county road. There is a solid line which represents the center line of the existing railroad right of way and there is a broken line with

figures along it which represents the Southern Pacific engineer's idea of where the old road used to go. Now, with these things in mind would you mind stepping to the map and explaining to the Court your recollection of that old road that you knew and you have been talking about with relation to the existing road?

A. Yes, sir.

Q. Now, you understand that the left hand of the map is Niles and the right hand of the map is Sunol?

A. Yes, sir.

Q. And that the lines on the map are as follows: The red line represents the center line of the road as it exists today, the wagon road as fixed by the survey of Mr. Harrold and these two broken lines represent—the long line with two dots in between longer lines show the outside limits of the four hundred foot right of way claimed by the Southern Pacific Company and this colored line in between those two lines represents the center line of the track of the Southern Pacific Railway Company. You have those things in your mind and have that map straightened out so you can trace on it?

A. Yes, sir.

[fol. 118] Q. (Continuing:) The road as you knew it before the railroad came through the canyon?

A. Yes, sir.

Q. Would you step to the map, Mr. Buttner, and just trace on the map from the point at the beginning of red line nearest Niles, nearest the left hand side of the map, from that point through the canyon to the end of the map or the end of the red line near Sunol?

A. Well, we will start right at the beginning, at Farwell.

Q. Start at Farwell. You fix Farwell on that map at what position?

A. I fix Farwell on that map right in this position here (indicating).

Q. That is just beyond the point upon the map to the right of the legend which shows the second crossing?

A. Yes, sir.

Q. Just to the right of the legend?

A. Yes, sir.

The Court:

Q. You want him to trace the old road as it ran or as it runs today?

Mr. St. Sure: As he recalls the road prior to the railroad being put through the canyon.

Mr. St. Sure:

Q. Yes, your recollection of where the road ran?

A. This old road. Well, the old original road crossing, where it crosses the Southern Pacific tracks at Farwell for a ways was practically along in the same neighborhood as [fol. 119] the existing road until we came to what they called the Stone bridge, that is beyond the big curve here of the Southern Pacific. Well, here is where the present road crosses the creek on the bridge, that bridge there (indicating). Well, we used to go right down, follow right down where that bridge starts from the north side, we just followed right down along—followed where the present railroad is and the bridge in the same direction on the north side of the creek.

Q. Where the change began?

A. Began right there (indicating).

Q. That would be, this is engineer's station 1020 and that is engineer's station 1030. Between the two stations?

A. Between these two stations where they began.

Q. Nearer engineer's station 1020 than 1030?

A. Yes. Then they came right down, just followed the creek right along until we got pretty near opposite where the present Western Pacific large tunnel is on the opposite—well, we crossed the opposite side from that.

Q. Can you fix the approximate position as you recall of the Western Pacific tunnel on that map, the beginning of this change?

A. Yes, the Long crossing?

Q. Yes.

[fol. 120] A. Yes. Well, this Long crossing, we crossed over, we crossed the creek and came out at a point about here to the south side again (indicating).

Q. Would you make a mark for that?

A. Yes, there is about where the Long crossing started from this point here (indicating).

Q. Make another mark at the beginning of that.

The Court: Put a capital B.

Mr. St. Sure:

Q. Make a circle then and we will put a B by it.

A. All right.

Q. B1 is the beginning of the Long crossing, as you remember it and B2, the end of the Long crossing. Then we came to the south side and then we followed on that south side, well, the road was quite close to the Western Pacific as it comes right in this point here and then we went along there I guess for about five hundred yards and then we had to cross back again, from this point we crossed back over the creek to that side. That was quite a long crossing also.

Q. You have made two marks which I will number B3 and B4.

A. Yes. Then we followed right along that line on the north side of the creek until we got practically to where the old road is where we connected here again at Brightside with the new road. There is a bridge across—there [fol. 121] was a bridge across—there was a bridge across and there is another bridge, the bridge is down—that is where the bridge was (indicating).

Q. Place a mark where the old road came back with the new one at the present time.

A. Here is where the old road came back.

Q. Well number that B5.

A. Yes. And from there we run along below the present railroad until we got up—well, in fact, we got to, we strike now the other railroad crossing, over near—well, that is the same as the old road.

Q. As the existing road?

A. Yes. And I think, let me see there was—we had two crossings on the railroad, we had two crossings. Now, what point is this here, is that down where the present Spring Valley dam is connected or is it nearer Sunol?

Q. That I don't know.

A. There is two railroad crossings.

Q. Of course, you understand this red line doesn't go all the way into Sunol?

A. Oh, it does not.

Q. No.

A. Well, this here line then is where we crossed the railroad again about five hundred yards from where the Spring Valley dam is.

Q. Did the old road correspond?

A. Yes, the old road practically followed clear into Sunol.

[fol. 122] Q. Now, then, your testimony, if I may get the effect of it is that the old road at this point between Engineer's stations 1030 and 1020 as shown on this map ran a different course from the present existing road?

A. Yes, on the opposite side of the creek.

Q. The existing road runs a different course from the old road, from this point to the point which you have marked B5?

A. Yes, sir.

Q. And in all other respects it ran practically the same as the existing road? Is that a correct statement of your testimony?

Mr. Thunen: I object to that as leading and suggestive and not in line with the witness' testimony?

Mr. St. Sure: I think the testimony is clear enough.

The Court: I will allow it. I don't see that it is leading or suggestive. I will allow the testimony to stand.

Mr. St. Sure:

Q. Is that the correct testimony of your recollection of the road as it existed in relation to the road as it exists today?

A. Yes, sir.

Q. Have you traveled over that road at intervals, continuously since the early sixties. Over the road through Niles Canyon?

A. Yes, sir.

Q. Except for the change that you have pointed out upon [fol. 123] the map, that is the change in the course of the road between engineer's stations 1020 and 1030, the points you have marked as B5, except for that change has the road remained substantially the same, in practically the same position since the early days?

A. Yes. Well, there might be a few changes, not over fifteen or twenty or thirty feet to my knowledge.

The Court: What is the number of the second station?

Mr. St. Sure: The second place pointed out on the map is B5 with a circle. Have you finished your answer? Read the answer as far is it went, Mr. Reporter.

(Answer read.)

A. Might have been straightened out, there might have been places where it was straightened out a little.

Q. To your knowledge or in your recollection, Mr. Buttner, was there a road at any time through Niles Canyon or rather a road across Niles Canyon that ran over the ridges of the hill to the north of the creek?

A. No, there was not.

Q. The only road that you recall is the road that you have testified that you traveled along and the course that you have described on the map?

A. Yes, sir.

Q. Which corresponds in part to where you have testified to where the road exists today?

A. Yes, sir.

[fol. 124] Q. That road has been continuously open?

A. Yes, with the exception of sometimes in the winter time when we had floods and could not very well cross it, but in the summer time they were dry and kept it open so they could go through with light rigs, used to go to the Mills down there.

Cross-examination:

Q. You are not prepared to say that the old road did follow the exact line of the present road for any distance, are you?

A. For any distance?

Q. Yes.

A. Oh, it did for some distance.

Q. How do you determine that it is exactly the same as it was?

A. How do I determine it is exactly the same as it was?

Mr. Thunen:

Q. Yes. How do you determine that the line of the road at any point is in exactly the same position as it was in these early days of which you speak?

A. Well, it was on account of the old original road, I say certain points was followed just about in the same line as it is today with the exception we had to make this creek crossing and when they made that change in 1910 we came over the little tunnel and around and over the big tunnel and then crossed the bridge just on the other side of Brightside and came into the original traveled road again.

[fol. 125] Redirect examination.

Mr. St. Sure:

Q. Between the time you made this first trip, as you recall, and to the present time, you have lived continuously in Sunol?

A. Most of the time.

Q. During a long period have you been away at any one time.

A. Not more than about seven or eight years.

Q. And except for that time that you were away you have been familiar with this road and traveled on it?

A. The present road?

Q. The road through the canyon?

A. Yes, I have.

Q. And is it upon that basis and upon that knowledge that you have based your testimony.

A. Yes, sir.

Q. And upon the fact that you have traveled on that road continuously except for this period that you state you were away, since the early sixties?

A. Yes, I was an inspector when they built the new road in 1910.

Q. When they built the new road in 1910?

A. Yes.

Q. By that new road you mean the point of change there between engineer's stations 1020 and 1030?

A. Yes, sir.

Q. Along the canyon until it came to the point B5 marked on the map?

A. Yes, sir.

Q. And that change was made when?

[fol. 126] A. Somewhere in 1910, I think.

Q. And you have been familiar with the road since 1910, have you?

A. Yes, sir.

Q. As it exists today practically as shown upon that map?

A. Shall I answer?

Q. Yes.

A. Yes."

FRANK L. KING, called on behalf of defendants, testified that he was born in the Niles Canyon in 1872 and that he was familiar with the Niles Canyon and the existing wagon road therein, and that he served in the capacity of road foreman for the County of Alameda from the years 1912 to 1920. He further testified that he had been familiar with the course of the wagon road through the Niles Canyon since the year 1879.

"Mr. St. Sure:

Q. Do you understand the map that appears on the wall there, Mr. King. This right hand side represents the direction of Sunol and the other end of the map, the left hand end of the map represents Niles and Vallejo Mills is shown at that end. The directions upon the map, the arrow points to the north. The red line upon the map shows the surveyed line and the traverse of the traveled road as it now exists in the canyon. The other lines represent the four hundred foot strip of right of way claimed by the Southern [fol. 127] Pacific, is shown by a long line and the two shorter lines, the solid line between those two lines being the center line of the railroad right of way. Now the map represents or purports to represent the canyon through the hills known as Niles Canyon. The creek is also shown.

A. From the point of Stoney Brook, Farwell.

Q. From the point of Stoney Brook or Farwell.

A. You want me to trace the original road as I remember it in 1870.

Q. What we want you to do is to tell how the old road ran with reference to the present highway which is shown on the map by a red line.

A. The old road ran from Stoney Brook to this point at the stone bridge over the present highway—ran from Stoney Brook to the Stone bridge over the old original Niles Canyon road to that point, at the point of the stone bridge and the new road is on the south side of the creek for a distance.

Q. Where about, is the old road?

A. The old road from the Stone bridge where you know the highway leaves it now. The old road at the stone bridge left that point and followed close to the railroad, that is, close to the foot of the fill around the line between Section 11 and Section 12, where there was a ford. Here is the [fol. 128] railroad. It followed around a point about section 11 where there was a creek crossing, a long ford, following that, would be in the neighborhood of about between sections 11 and 12 and then it followed the railroad on the creek side to a point at Brightside. Now, the new highway is on the opposite side of the creek to this point at Brightside.

Q. And that road you said followed, the highway followed the railroad along there on the creek side, and the railroad was on the north side of the creek?

A. Yes, on the north side of the creek.

Q. Was on the north side?

A. Was on the north side.

Q. And you say it has been changed, the highway, to the south side.

A. From a point on the stone bridge to Brightside has been changed to the south side of the creek. Now, from Brightside, following from Brightside down to Sunol, the lines ought to be in here somewhere from Brightside and to Sunol it follows the old Niles Canyon road, the original road.

Mr. St. Sure:

Q. Mr. King, you were employed as a road foreman for the County of Alameda at the time the changes were made between the Stone bridge and Brightside, were you not?

A. Yes, between Stone bridge and Brightside. That was in about, if I remember right, 1910. I did not take the [fol. 129] position of road foreman until 1912, but I was in the canyon during the time.

Q. You were familiar with those changes when they were made and as they were made, is that correct?

A. Yes, sir.

GEORGE A. POSEY, called as a witness on behalf of the defendants, testified that he is the County Surveyor of Alameda County, which position he had filled during the last preceding five years; and that he has been a member of the staff of the County Surveyor from the year 1913 to the time of his own assumption of that office.

Mr. St. Sure:

Q. Mr. Posey, I am going to show you a document which has been admitted in evidence, the original plat of the field notes of survey of road No. 247, dated April 11, 1859. You have seen that before?

A. I have.

Q. And I am going to call your attention to the line upon this map which represents the work of Mr. Harrold, and I am going to call your attention particularly to the broken line which appears upon the legend as road No. 247, and I will ask you whether or not in your opinion as an engineer and surveyor, being given two terminal points fixing such line, that is, a point at Sunol, and a point at Vallejo Mills, [fol. 130] whether a survey line could be run accurately between those two points by merely taking these field notes and plotting the line upon a piece of paper?

A. If certain field notes are taken and considering that the notes—the bearings, for instance, are only to the nearest quarter of a degree, I believe that it would be very difficult to replace the line.

Q. And assuming a further condition that there should be no tie-in points between these two points, that is none of the tie-in points referred to in the field notes should be located, in your opinion would such a survey or such a re-running of the line upon the paper only be accurate in any degree?

Mr. Thunen: I object to that question upon the ground that there is no occasion for assuming anything. The witness has the field notes and the plat. It is leading and sug-

gestive from counsel who is testifying from what the surveyor has before him. It is not for counsel to suggest.

(Discussion.)

Mr. St. Sure: I merely want to draw from this witness whether or not in his opinion that the line which was run as Mr. Harrold testified it was run, merely from field notes and plotted upon a piece of paper, with only two points fixed, whether or not in his opinion as a surveyor and engineer, that would be an accurate representation of the line? [fol. 131] The Court: I will allow you to get his opinion of it. Mr. Harrold didn't state it was accurate. Approximately correct. The witness may answer the question.

A. I believe it would be very difficult to replace a line along in that manner on the ground as the roadway was intended to be in the beginning, being that the bearings are only to the nearest quarter of degree. A surveyor of this day and age would have a very difficult time relocating that roadway.

Mr. St. Sure:

Q. That plat you have in your hand represents or shows the topography of the Canyon in the vicinity of the road as delineated on that plat, doesn't it?

A. Yes, sir.

Q. Taking into consideration the topography shown upon that plat, does the road delineated upon that plat by the engineer, run upon the high points of the Canyon, through the hills on the north side, or does it run in the basis or bottom of the Canyon?

The Court:

Q. You may state whether or not the road indicated by the red line there passes over,—according to the map itself,—if the map means that the road is over the points on the high ground any place.

A. Well, the map is crude. The indication of these lines on the map, this place, these lines on the map would indicate a slope of a hill, it would indicate a hill, this being the [fol. 132] Canyon, and this also indicates a stream that runs down into Vallecitos creek. You will note that the line as plotted here is at the toe of these slopes. Well, there may

be some little portion close to the creek bank where it sloped and came up from the creek, and most of it is at the north side of the creek which would indicate from the map a flat ground, possibly with a slope on toward the creek itself.

Q. The creek bed?

A. The creek bed, yes. That would be because almost every crossing of Vallecitos creek practically down to Vallejo Mills with the exception possibly of a space just east of Vallejo Mills which might be in here (indicating) indicates high land but doesn't indicate any hill beyond. The general evidence to be deducted from the map would indicate that the line of the proposed roadway proposed by this survey ran in the bottom of the canyon or as close thereto as possible. The statement here on the map, itself says, "Plat of field notes of a survey of road from Vallejo Mills up the Alameda to the Stockton road near Bertand Bedon's" which would give the further indication that it meant the road was run in the bottom of the canyon.

Cross-examination:

Witness testified further that he believed, unless all the monuments and points could be identified practically from [fol. 133] course to course, that it would be very difficult for the original man to retrace his line.

Mr. Thunen:

Q. Did you make any effort to check the survey notes yourself with the existing county road?

A. These old survey notes of 247, 247 notes, do you mean?

Q. Anywhere?

A. Just endeavored to do so in the office.

Q. Did you succeed?

A. I could not make them fit.

Q. You did investigate the present existing County road?

A. Yes, I had the notes for the road.

Q. And your efforts were to check the old notes with the new?

A. Yes, and to correspond with previous testimony, but the notes are so loose, I don't believe anyone is capable of doing it.

Defendants offered in evidence as Exhibit D, topographic sheet of the Pleasanton Quadrangle, United States Geological Survey, a copy of which is here inserted.

(Here follows map, side folio 132a)

MAP IS TOO LARGE TO BE FILMED.

Mr. St. Sure:

Q. You are familiar with the Canyon and the roads that exist in the Canyon, are you not, Mr. Posey, in Niles Canyon?

A. I am.

Q. Mr. Posey, you have said heretofore, that you were familiar with the conditions topographical and otherwise, [fol. 134] on the ground through Niles Canyon, and you also are familiar, I presume with——

Q. You are familiar with conditions of the floor or bottom of the Canyon?

A. Yes, sir.

Redirect examination.

Mr. St. Sure:

Q. Mr. Posey, you have had considerable experience in road building, road surveying, and supervision of construction of roads?

A. I have.

Q. Basing your answer upon that experience and upon your knowledge of the Niles Canyon, could a road be constructed on the outside of the right of way lines as claimed by the Southern Pacific through Niles Canyon which would be safe, feasible, or practicable, or any one of these, which would be reasonably safe, reasonably inexpensive, reasonably practicable, and at the same time accommodate the public?

Mr. Thunen: To save the record, if the Court please, we renew our objection upon the ground I have heretofore stated that it is not material or competent for the reason that this is a strip originally granted by Congress for a specific purpose and these questions cannot enter into it, and for the further reason that the question takes into consideration too many factors which the witness cannot [fol. 135] answer, and it puts to the witness an engineering problem which would require a thesis rather than a simple answer. The question is too vague.

The Court: Overruled with that understanding. I recognize the fact that it contained matters that would go more to the weight of the testimony than as to its admissibility or competency. I feel to get a complete and satisfactory an-

swer to that question it would require perhaps some special investigation on the part of the witness, and it has not been shown he ever made such a special investigation, but he has testified that he is familiar with the Canyon, and familiar with surveys through there and topographical conditions. His qualifications as to a Civil Engineer were waived with the beginning of this examination if I remember correctly, so I will overrule the objection.

To which ruling plaintiffs reserve an exception, which is hereby designated as Exception No. 3.

A. Shall I answer?

Q. Yes.

A. Of course, at the present time there are several places where the road is outside of the four hundred foot right of way. In other places, in attempting to construct a road outside of the four hundred foot right of way we probably [fol. 136] would run up against a proposition of steep hillsides that would require very expensive cuts, long slopes, and consequently heavy embankments. The road is located in the bottom or at the foot of the slope in an endeavor to reduce the grade as much as possible. If the relocation was placed on the hillside the grade would be materially increased. As to the length of the roadway it would require the roadway to go back into the various canyons as you come to them instead of following up the face of the defile itself. Undoubtedly the road would be more dangerous because of the high slopes and the tendency for the rock and other material to fall down the road, and the expense would be very much greater than a road constructed at the foot of the slope. I don't know whether I can add anything to that answer or not; in other words, the relocation of that roadway outside of the four hundred foot strip would entail additional expense and additional grade and length of road and would endanger the people traversing the same by reason of the slopes, the tendency of the slopes to cave and rocks fall down.

Q. Summing up these facts, will you state whether it is your opinion that it is practicable and feasible?

A. A road can be built most anywhere regardless of the expense. It would be most practicable to build a road at [fol. 137] the foot of the slope and my answer would be

that it would not be practicable if it can be placed at the foot.

Q. You mean it is possible not feasible?

A. Possible but not feasible.

Mr. St. Sure:

Q. Now, Mr. Posey, you are familiar with the surrounding country outside of the Canyon. Can you give us an estimate of the length of a road that would take the traveling public from Niles to Sunol in the event they could not go through Niles Canyon?

A. The actual mileage?

Q. Yes, an estimate of the mileage.

A. No, I am not able off hand. Anybody going from Niles to Sunol any other way than up the defile or up Alameda creek would either go back to Hayward and over the Dublin pass, around through Dublin and down to Sunol, or by way of what is known as the Stockton Pass road across the Calaveras creek and back to Sunol. The exact mileage I am not——

Q. (Interrupting.) Would it be considerably longer or practically the same?

A. Would be considerably longer.

Q. Would it be as much as twice as long?

A. No, I doubt that. I am not able—I could scale it out on the map.

Q. The existing road through Niles Canyon—it is necessary for people living in the Canyon in order to have ingress [fol. 138] and egress, to use that road, is it not? There is no other road leading out or into the Canyon but the County Road?

A. There is one road that comes in at Farwell from Palomeras.

Q. That is at the edge of the disputed——

A. (Interrupting.) It is at the edge of the disputed territory. The nearest roadway would be by the Niles to the Stockton Pass road, over what is known as the Mission Pass back into Sunol. As far as I can scale it on this map the roadway from Niles to Sunol by way of the Niles Canyon would be in the neighborhood of six and one-tenth miles, while by the Mission Pass it would be nine and five-tenths miles. Practically fifty per cent more in length.

Q. The Mission Pass is the same as the Stockton Pass?
A. Yes, it is called the Stockton Pass road but it goes through——
Q. (Interrupting.) Nine and what?
A. Nine and five-tenths, nine and a half miles roughly scaled.
Q. Practically fifty per cent longer?
A. Fifty per cent longer.

Mr. St. Sure:

Q. Now, taking in the full length of the Canyon, suppose this road which is represented by the red line on Plaintiff's Exhibit 6 should be shut off where the red line begins and [fol. 139] ends, would it be possible at any other place upon the base of the Canyon to route a road outside of the four hundred foot strip right of way, that is, for the entire distance, so as to connect the two ends again.

Mr. Thunen: I object to that as calling for the conclusion of the witness. No foundation laid.
The Court: Objection overruled.

To this ruling plaintiffs reserve an exception, which is hereby designated as Exception No. 4.

A. As I stated in my other answer it would be possible to construct a road outside of the four hundred foot right of way.

Mr. St. Sure:

Q. At the base of the Canyon?
A. Not at the base of the Canyon. It would be either on the hillside, on the slope of the hill, or on the top. It would not be feasible for people on the south side to use a road that would be located on the north side and therefore probably would have to have two roads to allow people on both sides to go out.

The Court:

Q. As I understand you, it wouldn't be possible at all to put a road in the base of the Canyon, in the defile outside of the two hundred foot right of way other than the one that is now for the full length?

[fol. 140] A. Not the full length. There are certain places where you could do that, but not adjoining the four hundred foot right of way. Places up the defile possibly. There are places where it is entirely out.

Mr. St. Sure:

Q. Could you at this time, Mr. Posey—I realize it is perhaps taking unfair advantage of you—estimate with any degree of accuracy the cost of such a road as you have just described through the Canyon, a road similar to the one which now exists, that is a gravel road?

Mr. Thunen: We object to that question upon the ground that no foundation is laid. It has not been shown that this witness has made any actual investigation upon the ground.

Mr. St. Sure: I am asking him if he knows.

Mr. Thunen: That would be his conclusion.

Mr. St. Sure: Mr. Posey has stated that he has constructed roads and made surveys and is familiar with the contour of the Canyon itself.

The Court: They offer the foundation based upon his qualifications.

Mr. Thunen: I am not objecting to the qualifications. No man can say what it would cost.

The Court: Let him answer the question.

[fol. 141] The objection was overruled, and plaintiffs reserve an exception hereby designated as Exception No. 5.

A. The question is rather a hard one. It would be a conclusion there is no doubt about that. We would have to assume, however, that the construction in this particular country would be the same, the very same construction of grade and road, along the same proposition we have now in the construction of the Sky Line Boulevard. That would cost together with the culvert, etc. for a road on one side of the canyon, not considering any crossings or bridges in the neighborhood of twenty-five or thirty thousand dollars a mile on those slopes. Looking at the map I would assume that there is nearly four miles of rough roadway and the closest you could get it would be—would cost a hundred to a hundred and twenty-five thousand dollars to make a gravel roadway.

Mr. St. Sure:

Q. Exclusive of bridges and crossings?
A. Yes, sir.

Recross-examination.

Mr. Thunen:

Q. As a matter of fact, some fourteen years ago you did reconstruct the old road, didn't you?
A. In the bottom of the canyon?
Q. Yes, for a considerable distance, that is, outside of the railroad right of way site?
[fol. 142] A. Yes, sir.
Q. It is outside of the right of way at the point of the so called Mayberg curve?
A. That I could not say; I am not familiar with the curve. I believe that curve has been referred to as the Mayberg curve.
Q. Now, then, Mr. Posey, wouldn't it be possible to approach this Canyon on the southerly side of the creek instead of the northerly side?
A. From where, approached from where?
Q. From the end of the map here, we will say the westerly end of the map, the westerly end of the red line?
A. It is possible if the road is constructed above your track, you mean keep out of the four hundred foot of right of way?
Q. Yes.
A. The old road. There is a piece of the old road right along here to the north of your track that was shifted later to the side, over here, outside of your right of way, in order to get above your track in here. But it could be put on the top of the hills or if you put in a road on the other steep hillside at this particular point—here is your own bridge at Farwell.
Q. Now, then, assuming you cross—you come right down to the creek, right at the easterly end of the crossing, do you not?
A. Right in the creek.
[fol. 143] Q. Is there a slope on the southerly side as well as on the northerly side?
A. Yes sir.

Q. Couldn't you follow the base of the slope of the creek and across at the bottom of the slope from side to side; in other words, the hill slopes on either side of the creek, does it not?

A. Yes, sir.

Q. Isn't it possible and feasible to follow the southerly edge of the creek instead of the northerly edge?

A. It is possible but not feasible, because this slope, this side is very steep, and it would mean a proposition of cutting into the road, here, into steep hillside. This roadway from what is known as the stone bridge to this point outside of your right of way is in the bottom of the creek, and it would necessitate the putting up of a retaining wall on one side of the base of the hill and filling in with gravel over the creek. It is virtually in the bottom of the creek now.

Q. Now, you are right here and over this map, it travels for a distance of perhaps two miles or a mile and a half in sections 11, 14, 13, and 12, is that not a fact?

A. Yes, sir.

Q. Now, then, coming down to the point where you again enter the right of way in section 12, Township 4 south, Range 1 west, is it not feasible to continue on the southerly side instead of crossing the creek?

[fol. 144] A. At Brightside?

Q. At Brightside.

A. It is possible but the other alignment is much more feasible.

Q. The hills are not so rugged, the slope not so abrupt and steep?

A. The hills are further back but in order to get back over to Sunol it would take a very long expensive bridge to get back to Sunol and would entail a crossing of the Western Pacific.

Q. As a matter of fact, the Western Pacific is on that side, is it not? It hasn't many bridges.

A. It has a bridge across the creek to Sunol.

Q. And the only bridge you need now is the bridge in here, don't you?

Mr. St. Sure: I object to that as irrelevant, incompetent and immaterial.

The Court: Objection sustained.

To this ruling plaintiffs reserve an exception hereby designated as Exception No. 6.

Mr. Thunen:

Q. Is there a bridge across the creek there at the present time?

A. A temporary bridge.

Mr. Thunen:

Q. Is it the intention of the county to build a permanent bridge?

A. If they own the right of way.

[fol. 145] Mr. St. Sure: I stipulate we need a new bridge.

Mr. Thunen:

Q. Do I understand you correctly that it would be feasible to extend your road from the point where you now cross, the temporary bridge, it would be feasible to extend it, or keep outside of the railroad right of way?

A. I believe it would be possible as I stated before, but not feasible because it would entail grade separation between the County road and the Western Pacific, in order to get a road in through there and at the same time it would entail also the construction of an entirely new bridge to get back to Sunol at the easterly end of the road. Where it is now at this particular side there appears an abutment left of that bridge and would only need to be, to be spanned, would only need spans.

Q. I am not asking for a comparison of expense, whether one road or the other is chosen, but whether from the standpoint of expense of engineering it would be practicable to build that road, to continue it on, say the southerly side of the creek at least on the southerly side of the railroad right of way?

A. From an engineering viewpoint I would say possible but not feasible and I would not report for it.

Q. Will you state what grounds of feasibility are lack-
[fol. 146] ing, leaving out of consideration that it is cheaper on the site of the railroad right of way?

A. That is one of the primary considerations, is the expense of any road.

Q. Any road costs money to build?

A. I say the primary proposition in building any road is the expense.

The Court:

Q. You want to get certain results with the least money possible?

A. Yes, sir.

Mr. Thunen:

Q. Then, you base your answer primarily on the difference of cost between maintaining the road where it is and making a new grade?

A. To construct a new one.

Q. Construct a new road?

A. The maintenance of a new road located on the south side would be far more expensive than on the north side. On the south side, as I stated before, we would probably be involved with deep canyons and increased length of roadway, heavy cuts and consequently heavy fills, and an entirely new bridge, probably a high level bridge that would be much longer than the one at Brightside.

Q. Are there a great many creeks coming in from the laterals of Alameda Creek easterly?

A. You mean creeks or Canyons.

Q. Creeks or canyons, either one?

A. There are quite a number of canyons going up the south side, that is, goes in and makes indentations of what [fol. 147] would otherwise be a smooth floor of the canyon. The higher you go, the further away from the creek you go, consequently your alignment is increased, and the steep hillsides involve heavy exacavations which takes years to settle, and consequently the maintenance of such a line would be much more than the present line.

Q. I show you the geological sheet, call your attention to the geological sheet that has been offered in evidence by the defendant, and particularly to the lack of contours shown beyond the point, opposite Brightside and the Sunol neighborhood.

A. Lack of contours?

Q. Yes. Doesn't that show substantially an even elevation unbroken by lateral canyons?

A. The contours as shown here are fifty feet contours. In other words, they are fifty feet apart in vertical elevations.

Q. That is largely a wide area?

A. That is quite a wide area and would seem to indicate that there is some flat land. That is true in and around Brightside and in the bottom of the canyon. If you will notice on the side there are many indentations of the hills which would force the roadway higher and would increase the length of the road and would also involve a grade crossing over the Western Pacific, the present Western Pacific.

[fol. 148] Mr. Thunen:

Q. As a matter of fact, you maintain how many grade crossings on the Southern Pacific line?

A. Two at the present time.

Q. Two. In that particular place. There is one at Farwell.

A. One at Farwell and two others. Two others near Sunol.

Q. Yes, these are only shown here, one is—one of them is shown on the map.

A. And you would have—we only have one crossing with the Western Pacific and if you build on that side we would have two.

Q. Have two with the Western Pacific?

A. One to cross to the south side and one to cross back to Sunol.

Redirect examination.

Mr. St. Sure:

Q. The Western Pacific railroad right of way is on the south side of the Canyon, isn't it, Mr. Posey?

A. Yes, sir.

Q. Now, in the event that this road on the south side should be built as you have stated that is is possible but not feasible, I believe you testified that it would not be available for use by the people living on the north side of the Canyon.

A. Not at all times, without bridges or some method of crossing the creek.

Mr. St. Sure:

Q. Then, that is another additional item of expense that [fol. 149] would enter into the construction of a road built through the Canyon, in your opinion, is that correct?

A. Yes.

Mr. St. Sure:

Q. Now, I think, Mr. Posey, you testified as to this, but I would like to be permitted to ask the question. You stated, Mr. Posey, that the element of expense had a great deal to do with determining the feasibility of a road. Would you state whether or not the element of safety also enters into the conclusion as to the feasibility of two roads, two given roads, for the construction of a road.

Mr. Thunen: We object to that as leading and suggestive.

The Court: I don't see that it is leading. It does not suggest the answer.

The objection was overruled, and plaintiffs reserve an exception hereby designated Exception No. 7.

A. I would say that the matter of safety is a very large factor in the location of a road.

Mr. St. Sure:

Q. As between the existing road through Niles Canyon and a road upon the side of the hill or on a slope outside of the four hundred foot right of way, would you state whether or not in your opinion one road would be more or less safer than the other?

A. The present road through the Canyon has been there a number of years and the slope has vegetation growing on [fol. 150] the side which has a tendency to keep the soil in place along the upper slopes. If a new road is built through there it may take ten years or more before the slopes become suitable, and consequently you will have slides on account of the slopes and also the rains and other débris dropping down onto the roadway and endangering passing vehicles and people.

Recross-examination.

Mr. Thunen:

Q. Do you know how close the highway approaches to the railroad track at its nearest point?

A. Not in here but at Farwell it is very close, near Farwell, this place right here (indicating).

Q. It crosses there?

A. It crosses and it really parallels the railroad track very closely.

Q. That is a dangerous element too, is it not?

A. A grade crossing?

The Court:

Q. No the proximity of the highway to the railroad track?

A. Not at that particular place except at the crossing, because the road is below the grade of the railroad at that particular place.

Redirect examination:

Mr. St. Sure: I have a few further questions I want to ask Mr. Posey concerning expenditures that have been [fol. 151] made under the theory of estoppel as appears in our answer in the fourth defense, our theory in this connection being that considerable sums of money have been spent by the county not only in the construction but the maintenance of the right of way.

The Court: I have read it.

Mr. St. Sure:

Q. In this connection, I will ask you, Mr. Posey, whether or not you are familiar with expenditures made by the County in the maintenance of the County road through Niles Canyon, are you familiar with those expenditures that have been made by the county?

A. I am familiar with some of the expenditures made on contracts.

Q. You have made an investigation of the records of the Board of Supervisors and have procured certain figures from those records?

A. I have.

Q. Pertaining to contract work done on the road, is that correct?

A. Yes, sir.

Q. And you have a list of a number of those contracts and the expenditures, have you not?

A. I have.

Q. Would you state the total amount of expenditures as revealed by those figures?

Mr. Thunen: One moment, I object to that, if the Court pleases, upon the ground that it is not material. There is no estoppel pleaded and no estoppel will lie under law. I [fol. 152] don't know where the witness gets his figures, but it is not the best evidence. He is assumed to copy them from the records, but there would be no objection made upon the ground that they are not the best evidence.

The Court: Objection overruled, because I think the estoppel is pleaded in the fourth separate defense.

Mr. Thunen: It is not. I believe it merely says that they have that highway and that the roads are necessary for public accommodation.

Mr. St. Sure: On page 12 it states that the defendant (reading) "has expended great sums of money for the establishment, operation and maintenance of said road and highway and roads and highways over said land and every part thereof, which said expenditures by said County of Alameda have extended over a long period of years as aforesaid, and said defendants further allege that all of the acts and things above mentioned in this fourth defense were and are done and continued with the full knowledge of and without any objection by or on behalf of the plaintiff herein." Namely, there was no objection to the possession, operation and maintenance of a road for a long period of years entailing a considerable amount of money.

Mr. Thunen: I have overlooked the defense on that par- [fol. 153] ticular ground, they have pleaded it and apparently it is not a good ground, the ground is not good.

The Court: As to whether the question of estoppel would lie in this case or whether any such defense could be interposed or whether any fact in the defense could be made or not, it is all involved in that ground, but I will overrule

it only on that ground. I would have sustained the objection as to the best evidence.

Mr. Thunen: The effect.

The Court:

Q. You have made this investigation yourself now, and have the figures and are they accurate from the records?

A. These have been taken from the actual payments as made by the County Surveyors of it, or from the Supervisors for payments of money on these particular contracts.

Q. And so far as you know those figures are correct?

A. Yes, sir.

Q. Correct excerpts from the record?

A. Yes.

Mr. St. Sure:

Q. And on the basis of these estimates the payments are made; in other words, the payments are based on this, the actual payment of money?

A. Yes.

To this ruling plaintiffs reserve an exception designated as Exception No. 8.

[fol. 154] The Court: You may state.

A. The total amount of money paid on these estimates for the various contracts in Niles Canyon roads beginning in November, 1906, to March, 1925, amounts to $114,692.34.

Mr. St. Sure:

Q. Now, just read off for the purpose of having these items into the record, the amount that you refer to, read off that list in the manner that you have stated.

A. On November, 1906, repair of bridge one-half mile east of Farwell, $5,000. January, 1910, constructing portion of roadway, No. 4974, $3900. April 10, repair of bridge at Farwell, $2,474. August 10, bridge at Brightside, $8,873. September 10, curtain wall at Farwell, $1,438. August 11th, small bridge and retaining wall at Brightside, $3,714.45. August 11th, small bridge and retaining walls above Farwell, $4,979. August 11th, curtain

wall at Farwell, $2,525. August 12th, widening Niles Canyon road, which was County No. 4974, $47,856.26. July 14th, retaining wall and slope walls, grading County road No. 4974, $31,986.10. March, 1925, repairs to the bridge at Brightside, $1,946.53. Total, $114,692.34.

Q. Now in addition to these expenditures made under contract has any additional money been expended in the maintenance or repair of the Niles Canyon road within the boundaries of this disputed area to your knowledge?

[fol. 155] Mr. Thunen: We object to that question as going into the expenses of maintenance and repair. That would be no ground of estoppel in any event.

The objection was overruled, and plaintiffs reserve an exception designated as Exception No. 9.

A. There has been money expended for graveling and maintenance, sprinkling, small culvert work on that portion from year to year by the road masters from the road district funds.

Mr. St. Sure:

Q. That is, aside from the total that you gave, in addition to the totals you have given, these expenditures that you have testified to that extended over the period from 1906 to 1925?

A. Yes, sir.

Q. These figures you have given and have testified to, Mr. Posey, do not include the original cost of establishing that road, do they?

A. No, this is since 1906.

Recross-examination:

On recross-examination Mr. Posey testified that the figures given included all expenditures on that portion of road No. 4974 indicated by the red line on the map between the two termini of Mr. Harrold's survey as shown on plaintiffs' Exhibit No. 6.

[fol. 156] Q. Now road 4974 differs from the line that existed before 4974 was adopted, does it not, in part?

A. In part. It is supposed to include as much of 247 as was feasible to use.

Q. How do you know that any of that previous road was part of 247?

A. The only way I can locate 247 is by the old position of the road as it existed previous to 4974.

Q. How do you know that that was road 247?

A. I must assume that that was county road 247.

Q. You just assume that, you didn't check it on the ground with the survey and actually establish that?

A. No, we never have run out 247.

Redirect examination.

Mr. St. Sure:

Q. Within the limits of the four hundred foot strip claimed by the Southern Pacific Company and between the two termini as shown upon that map, the termini of the red line, can you state where County road No. 4974 deviated from the old alignment of the road that existed prior to the establishment of that road?

A. Well, in some cases but not in all cases.

Q. Point out—I think you have been over that once, but point it out just where this is?

[fol. 157] A. The only particular one I have in mind where the old road still exists, you can see this old road as it went from the north side of Brightside, the so-called Brightside bridge on the north side of the creek to the west within four hundred feet of the strip of the railroad right of way.

Q. That is this point from R5 to the Brightside bridge around this curve; is that correct, up to this point?

A. Not all the way.

Q. Point out the portion that was changed, please?

A. The property would extend in general from the point R5 to R4.

Q. And the change—from that distance was changed back, the road, from within the right of way here claimed to without it, was it not?

A. It was.

Q. Within the four hundred foot right of way strip as claimed by the Southern Pacific Company and shown on that map, can you point out, as of your own knowledge, any change in the course of the old road to the present location of the road as shown by the red line?

A. None except that particular one.

Q. I take it by that answer there are none you can point out of your own knowledge that is within the four hundred foot strip?

[fol. 158] A. Not to my own knowledge. I know there is below.

Q. Outside of the disputed area?

A. Outside of the disputed area.

Defendants offered in evidence as "Exhibit BB" documents on file with the Clerk of the Board of Supervisors of Alameda County, which included the following: Petition, Report of Viewers and Resolution abandoning a portion of County road No. 247.

DEFENDANT'S EXHIBIT "BB"

"To the Honorable the Board of Supervisors of the County of Alameda, State of California.

GENTLEMEN: We, the undersigned, your petitioners respectfully represent and show:

First. That each and all of the persons whose names are signed to this petition are freeholders of Niles Road District, in Washington Township, and Vallecitos Road District, in Pleasanton Township, County of Alameda, State of California, and taxable therein for road purposes.

Second. That we desire your Honorable Body to abandon in said road districts all that portion of County Road No. [fol. 159] 247, 50 feet more or less in width, described as follows, to-wit: Beginning on said County Road No. 247 at Station 1 and following the line of said County Road No. 247 to Station 57 thereof, Being in the Townships of Washington and Pleasanton, County of Alameda, State of California.

Third. That the names of the owners of the land over which the portion of said County Road No. 247 to be abandoned passes are as follows, to-wit: The County of Alameda.

Wherefore your petitioners pray that your Honorable Body will receive this petition and appoint viewers and take such other steps as may be necessary to abandon said portion of said County Road No. 247 as a public highway.

Edward A. Ellsworth, Chas. Evans, Antone C. Garcia, J. C. Shinn, James Rose, M. B. Sneden, M. H. Tyson, Thos. J. Murphy, J. D. Lynch, W. J. Hughes, John Andrews, G. G. Bayley, H. J. McDermott, Wm. Day, F. B. Freeman, M. D., L. J. Ager, J. A. Silva, M. D. Asouge, John Trimingham, R. Watkins.

[fol. 160] (The following indorsement appears on this document:) "Petition for Abandoning County Road No. 247. (Stamped:) Filed Sept. 12, 1910. John P. Cook, County Clerk, by H. Mulvilson, Deputy Clerk."

STATE OF CALIFORNIA,
County of Alameda, ss:

I, John P. Cook, County Clerk of said County, and ex-officio Clerk of the Board of Supervisors in and for said County, State of California, hereby certify that at a meeting of said Board, held on Sept. 12, 1910, a petition was presented by Edw. A. Ellsworth and others of Niles and Vallecitos Road Districts in Washington and Pleasanton Townships of said County, for abandonment of a public road 50 feet wide throughout its entire length; and the center line of said proposed public road is described as follows, to-wit:

Commencing (See Petition) (Road #247, portion of.)

And I further certify that the said petition was received and the accompanying bond approved and P. A. Haviland, County Surveyor, C. B. Overacker and J. T. Foute were [fol. 161] duly appointed viewers, with instructions to view, locate and survey the said proposed road, and a report thereof render to the Board of Supervisors of said County at their earliest convenience.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Board of Supervisors of Alameda County, at the city of Oakland, this 13th day of September, 1910.

John P. Cook, Clerk, by H. M. Wilson, Deputy Clerk.
(County Seal.)

STATE OF CALIFORNIA,
County of Alameda, ss:

I do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of California, and that I will truly and impartially perform the duties of a Road Viewer in viewing out and surveying the proposed road described in the petition hereinbefore referred to and a true report thereof render to the Board of Supervisors as soon as practicable.

P. A. Haviland, J. T. Foute, Chas. B. Overacker.

[fol. 162] Subscribed and sworn to, as to P. A. Haviland, before me this 20 day of Feb., 1911. H. M. Wilson, Deputy County Clerk.

Subscribed and sworn to, as to J. T. Foute and Chas. Overacker, before me this 20 day of Feb., 1911. H. M. Wilson, Deputy County Clerk.

(The following indorsement appears on this document:) "Road Survey, abandonment of portion of Road No. 247. Washington and Pleasanton Tps., Alameda County. Order for Survey and Oath of Viewers. Filed March 6, 1911. John P. Cook, County Clerk, by H. M. Wilson, Deputy Clerk.

To the Honorable the Board of Supervisors of the County of Alameda, State of California.

GENTLEMEN: We, the Viewers, appointed by an order of your Honorable Body to view and survey the proposed abandonment of a portion of County Road No. 247, 50 feet, more or less, in width, said road to be abandoned from Station 1 to 57 thereof and being in the Townships of Washington and Pleasanton, Alameda County, California, [fol. 163] as petitioned for by Edw. A. Ellsworth, et al., on September the 10th, 1910, report as follows, to-wit:

That we are disinterested citizens of Alameda County and are not petitioners on the above mentioned petition, and that we have been sworn to discharge our duties faithfully as said viewers.

That we have viewed and surveyed the route of the proposed abandonment and have notified the owners of the property adjacent to the proposed abandonment.

That the road to be abandoned passes over the lands of the County of Alameda, insofar as the title for road purposes extends.

That all of the property owners adjacent to said proposed abandonment consent to said abandonment.

That it is proposed to substitute for the portion of said road to be abandoned, a new County Road. The deeds for said new County Road having been presented to your Honorable Body and which said new road will answer all the purposes of the present road and afford a more direct and practical route.

We submit the following survey of the route and termini of said portion of said County Road No. 247 proposed to be abandoned.

Beginning on said County Road No. 247 at Station 6 thereof and following the line of said County Road No. [fol. 164] 247 in a general Southwesterly direction to Station 57 thereof excepting therefrom such portions as lie within the lines of County Road No. 4974 being in Niles Road District, in Washington Township and in Vallecitos Road District, in Pleasanton Township, Alameda County, California.

We find that the cost of the abandonment of the said portion of County Road No. 247 will be nominal and that said abandonment will necessitate the substitution of County Road No. 4974 hereinbefore referred to.

And we recommend that upon the completion of the passing of the deeds for said County Road No. 4974 and upon the adoption of a resolution establishing a public road upon the lines, as stated in said County Road Survey No. 4974, that the prayer of the petitioners, in the matter of the abandonment of the herein described portion of County Road No. 247, be granted.

Respectfully submitted.

P. A. Haviland, Viewer. Chas. P. Overacker, Viewers. J. T. Foute, Viewers.

[fol. 165] (The following indorsement appears on this document:) "Viewers' Report. Abandonment of County Road No. 247, Alameda County. Filed Mar. 6, 1911. John P. Cook, County Clerk, by H. M. Wilson, Deputy Clerk.

Whereas, on September 12th, 1910, Edw. A. Ellsworth, et al, did petition this Board of Supervisors of the County of

Alameda to abandon a portion of County Road No. 247, and

Whereas, this Board having duly considered said petition did appoint three viewers to view and survey said proposed abandonment and report to this Board, and

Whereas, said viewers did on the 6th day of Mar. 1911, render a report in writing, which report is entitled "Report of Viewers on Proposed Abandonment of a Portion of County Road No. 247", and which report is on file in the office of the clerk of this Board, and

Whereas, said report of viewers did recommend that the prayer of the petitioners be granted on certain conditions in said report being fulfilled, that is the acceptance of the County Road No. 4974, and

Whereas, said County Road No. 4974 has been duly established as a public highway and County Road,

[fol. 166] Now, therefore, be it resolved, by the Board of Supervisors of the County of Alameda that the said report of viewers be and the same is hereby approved and adopted, and

Be it further resolved, that the portion of said County Road No. 247, described in said report to viewers, to-wit:

Beginning on said County Road No. 247 at Station 6 thereof and following the line of said County Road 247 in a general southwesterly direction to station 57 thereof excepting therefrom such portions as lie within the lines of County Road 4974 being in Niles Road District, in Washington Township and in Vallecitos Road District, in Pleasanton Township, Alameda County, California, be and the same is hereby declared to be abandoned as a public highway and County Road of the County of Alameda, State of California.

(The following indorsement appears on the back of this document:) Resolution abandoning portion of County Road No. 247. Filed Mar. 27, 1911. John P. Cook, County Clerk, by H. M. Wilson, Deputy Clerk.

[fol. 167]

Rebuttal

In rebuttal plaintiffs offered in evidence the original files of the Board of Supervisors of Alameda County in the mat-

ter of the petition for County Road No. 689, which files were received as

PLAINTIFF'S EXHIBIT 18,

the petition being in words following:

To the Hon. Board of Supervisors of the County of Alameda:

The undersigned citizens of Washington and Murray Township residing in the vicinity and on the road from Vallejo Mills to Bartrans in Sunol Valley, would respectfully represent to your Hon. Body that a relocation of said road is essentially necessary. Commencing at a point a little east of where the present road crosses the Alameda Creek; thence running south of parallel with the present location and near the same to connect with the present survey at or near C. C. Scotts. If a road was made upon the present surveyed route it would be destroyed by the first rise of the creek. Whereas, if said road re-location be made the road would be upon good ground and not subject to be destroyed [fol. 168] by high water as at present as your petitioners will ever pray, etc.

S. D. Warren, S. Heyer, Thos. Scott, Sam'l I. Marston, James Henson, George W. Jordan, William Incell, Charles Bern, Wm. Bafter, T. Hanna, Jr., M. S. Poesson, Tgnas Schleim, T. Milton, Wm. A. Jordan, H. C. Smith, H. H. Crankhite, M. P. Buckley, J. R. Waves, Isaac Scott, Wm. Snyder, O. C. Simms, O. T. Stankey, J. B. Walton, L. Schojdt, Henry J. Smith, I. B. Irand, Jno. Bollengee, Maquin King, Charles Boerse, Aaron Neir, H. T. Crankhite, H. W. Nuttman, E. Ballengee, James Yeodall, Marshall Higgins, E. Cearly, John R. Martin, S. F. Brown, Henry Hahn, G. W. Manuol, John Richman, J. H. Cole, S. T. Bonner, M. Luders, Jerry Ziegenfasse, S. Taylor, C. B. Gueloeenne, J. C. Norcross, N. L. Hastings.

Personally appeared D. D. Henion, the party over whose land the road petitioned for within will pass, and waives no- [fol. 169] tice required by law, and consents that said road be located as prayed for, and waives all claims for damages.

D. D. Henion.

(The following endorsement appears on this document:) To the Hon. Board of Supervisors of Alameda County. 689. Petition for a Public Road in Washington T. Filed June 19, 1865. G. E. Smith, Deputy Clk. Ordered surveyed and report at next meeting this 19th day of June, 1865. Yours, &c., G. E. Smith, Depy. Clk.

As a portion of said plaintiff's "Exhibit 18" the County Surveyor's report upon the foregoing petition was received and is in words and figures as follows:

"Plaintiff's Exhibit 18 in Evidence

No. 689

C. P. R. R. Co. et al.

vs.

Alameda Co.

To the Honorable the Board of Supervisors of Alameda County.

Gentlemen: In compliance with your order, I have surveyed and herewith return plat and field notes of a proposed [fol. 170] alteration of the west part of the road through Alameda Creek cañon, in Washington Township.

The plat indicates the principal difficulties of the route, which runs most of the way, over table land above ordinary high water; except at the Creek crossings, which present nearly the same facilities for fording as heretofore.

The land taken is of poor quality for cultivation except through Capt. Scotts.

The quantities taken for a three rod road would be as follows, viz:

0.90 Acres of the Mill property,
2.54 Acres of D. D. Henion,
2.64 Acres of Capt. Scott,
.52 Acres of creek bottom—last crossing,
.15 Acres of J. G. Clarke,

for all of which an equivalent will be rendered by vacating the old road. All of which is respectfully submitted.

T. O. Hopkins, Co'y Svr., Alameda Co'y.

Marginal Note: 8/7. 65. Pl'f's Ex. 18.

[fol. 171] H. F. HARROLD, recalled by plaintiffs in rebuttal, testified:

Q. Mr. Harrold, have you ever in your investigation of this Niles Canyon situation considered whether it would be practicable to reconstruct the County Highway outside of the railroad right of way?

A. I have, in a general way.

Q. Have you considered that general question of the road encroachment there over any great period of time?

A. In making this whole investigation we had in mind whether a road could be located at some other point in the canyon other than its present position.

Mr. Thunen:

Q. Have you had experience in location of roads?

A. Wagon roads and railroads.

Q. What conclusion did you reach as to the practicability of relocating that highway outside of the railroad right of way lines?

A. My conclusion was it could be located outside of the railroad right of way, but that the present road was the better alignment. It could be put over on the other side of the creek.

Q. Are there any very serious obstacles in the way of construction outside of the railroad right of way?

A. I could see none that were very serious, but it would entail considerable cost, but from an engineering stand-[fol. 172] point I believe it could be located on the south side if necessary.

Q. Would that be the most practicable location for it?

A. I believe it would.

Mr. St. Sure: What would be?

A. On the south side of the creek, that is, to get it off of the four hundred foot right of way of the Central Pacific Railroad Company.

Mr. Thunen:

Q. Mr. Harrold, some attack has been made upon the location of the line of the placing of the line of the old road survey 247 on this map. Now I will ask you, given two definite points, starting and closing and the evidence of an old road practically midway between and the notes which

you had in protracting the line of the old survey 247 upon this map, would or would not the factor of error be so great that you could not place the line upon the map with reasonable accuracy?

A. There is either one of two things in answering a question of that kind. If the beginning point and the ending point of the survey line as recorded are definite on the ground then if the road notes are fitted between those two points they can only set in certain places or else the road notes themselves are inaccurate.

[fol. 173] Q. Did you or did you not fit these lines in with the old survey on this map?

A. I fitted the initial and the ending points of the road notes of 247 on the map, the exact line, fitted the road in exactly between those two points. It could not be any different than is shown there and conform to the notes as recorded in the file of notes on 247.

Q. Did or did not your line as protracted conform to the configuration of the hill as exhibited there?

A. The line of the road 247 as shown there followed approximately parallel to the line of the railroad, the original railroad, as it is on the ground today, and follows the topograph that is followed by the railroad except it is a little higher in elevation. There is very little difference. There is very little difference in the line of the two roads.

The Court:

Q. Are you ready to say that the line of a road were constructed and run on that line of survey the road would not run where it ever ran before?

A. If it was run upon the ground as it is shown on the map I am satisfied that no road ever ran in that place. Is that what you mean, Judge?

Q. Yes.

A. Yes, I don't believe that a road was ever built as it is shown on that map. However, the notes put it there.

[fol. 174] The foregoing embraces all the evidence upon the issues to be raised on appeal.

The court found (Finding V) among other things that County Road No. 4974 was adopted March 27, 1911, and

that such parts of the old road No. 247 as were not expressly abandoned by the board of supervisors on that date, and now included within the limits of County Road No. 4974, are a part of the present traveled road.

Plaintiffs reserve an exception to this implied finding of a relation between old road 247 and the present traveled road in view of the further finding in the same paragraph that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with County Road No. 4974, or whether the highway traveled prior to 1911 followed the line of survey No. 247 for any distance whatever. This exception is hereby designated as Exception No. 10.

The court found further (Finding V) that physical conditions make it practically necessary to maintain the highway upon the railroad right of way.

To which finding plaintiffs reserve an exception upon the ground that there is no estoppel, and the right of way claimed under special Congressional grant cannot be made [fol. 175] to yield to the practical necessity or convenience of the county. For convenience this exception is hereby designated as Exception No. 11.

The court found (Finding V) that the defendant County of Alameda has expended for improvements and maintenance of the highway through Niles Canyon since 1911 more than $100,000, and that said highway is necessary for public accommodation.

To this finding plaintiffs reserve an exception upon the grounds stated in the exception last preceding, and upon the further ground that expenditures for maintenance of a previously established road are not material. For convenience this exception is hereby designated as Exception No. 12.

The court found and concluded, among other things, that Central Pacific Railway Company is the owner in fee of the railroad right of way through Niles Canyon, subject, however, to an easement in favor of the County of Alameda by reason of necessity to maintain its present highway through the Canyon, which easement is, nevertheless, subject to the terms and conditions of section 2 of the Act of Congress approved March 3, 1875, authorizing the railroad company to [fol. 176] take and occupy the highway for railroad purposes, upon providing a substitute highway at its own ex-

pense in the most favorable location and in as perfect a manner as the original road.

To this finding and conclusion of a removable easement or any easement held by the County of Alameda for highway purposes plaintiffs reserve an exception which is hereby designated as Exception No. 13.

Judgment was given and entered in accordance with the conclusions above recited. The judgment further quieted the title of Central Pacific Railway Company to all portions of the highway outside of Niles Canyon and within the railroad right of way. In due course plaintiffs presented their motion for an order setting aside and vacting that part of the judgment adjudging the fee title of Central Pacific Railway Company in and to the railroad right of way through Niles Canyon subject to an easement in favor of defendant the County of Alameda, and substituting therefor another and different judgment in respect of the said parcels of land in Niles Canyon so as to include the highway through Niles Canyon in the same category as the highway outside of the canyon and within the railroad right [fol. 177] of way, quieting the title of plaintiff Central Pacific Railway Company as against the defendants, and enjoining the defendants from claiming or asserting any right, title or interest whatever in or to the railroad right of way through Niles Canyon, and that the conclusions of law be amended accordingly. The motion was denied and plaintiffs then and there reserved an exception which is hereby designated as Exception No. 14.

Plaintiffs further in due course presented their motion for a new trial based upon (1) insufficiency of the evidence to sustain that part of the decision that the defendant County of Alameda owns or has an easement for highway purposes or otherwise on the railroad right of way through Niles Canyon; (2) that the decision is against law in the respect that it purports to make the title of plaintiffs granted by the Act of Congress approved July 1, 1862, subject to the limitations of the subsequent general right of way act approved March 3, 1875. (3) That the decision is against law in the respect that it purports to subject the title of plaintiffs to the necessity or convenience of the County of Alameda. (4) Error in law occurring at the trial and excepted to by plaintiffs. Said motion was denied

and plaintiffs reserved an exception which is hereby designated as Exception No. 15.

[fol. 178] ASSIGNMENT OF ERRORS

Plaintiffs specify the following errors of law which occurred at the trial:

1. The court erred in receiving the record of proceedings before the board of supervisors with reference to County Road No. 247, there being no authority at that time under the federal statutes whereby the county could acquire the right of way for a highway over public lands. (Exception No. 1.)

2. The court erred in refusing to strike the proceedings before the board of supervisors relative to road No. 247 for want of proof that the road was ever actually opened or accepted by the county or that a road ever did exist as contemplated by that petition and survey. (Exception No. 2.)

3. The court erred in overruling plaintiffs' objection to the question directed to County Surveyor Posey whether a highway could be constructed outside of the railroad right of way lines which would be reasonably safe, reasonably inexpensive, reasonably practicable, and at the same time accommodate the public. This, because as stated in the objection, the railroad right of way was granted by Congress for a specific and exclusive purpose, and for the further reason that the question embraces many factors for which no foundation has been laid, and was so vague as not [fol. 179] to be susceptible of a direct answer. (Exception No. 3.)

4. The court erred in overruling plaintiff's objection to the similar question addressed to Engineer Posey, the point being saved by Exception No. 4.

5. The court erred in overruling the objection to the question directed to Mr. Posey as to the cost of such a road, the objection being based upon lack of foundation in that the witness had made no investigation upon the ground. (Exception No. 5.)

6. The court erred in sustaining defendant's objection to the question directed to Mr. Posey on cross examination relative to lack or disrepair of the highway bridge across Alameda Creek. (Exception No. 6.)

7. The court erred in overruling plaintiffs' objection to the question whether the element of safety entered into the consideration whether a different road would be feasible. (Exception No. 7.)

8. The court erred in overruling plaintiff's objection to the question asked witness Posey as to the expenditures made in the maintenance of the existing highways through Niles Canyon; this upon the ground that no estoppel was pleaded and that estoppel will not lie in this case. (Exception No. 8.)

[fol. 180] 9. The court erred in overruling the objection to the question as to the expenditures in maintenance and repair of the Niles Canyon Road upon the ground that maintenance and repair of existing road are in no event ground of estoppel. (Exception No. 9.)

10. The court erred in its reference to Road No. 247 as having any relation with road No. 4974 or the present traveled road, in Finding V, in view of the finding in the same paragraph that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with county road No. 4974, or whether the highway actually traveled prior to 1911 followed the line of survey No. 247 for any distance whatever. (Exception No. 10.)

11. The court erred in its finding and conclusion that the railroad right of way through Niles Canyon is subject to the convenience or necessity of the defendant County of Alameda by reason of the physical conditions or otherwise. (Exception No. 11.)

12. The court erred in its conclusion that the County of Alameda had acquired any rights upon the railroad right of way through Niles Canyon by reason of the County's expenditures in maintenance of the highway. (Exception No. 12.)

[fol. 181] 13. The court erred in denying plaintiff's motion to set aside that portion of the judgment decreeing that the defendant Alameda County has an easement for highway purposes within the railroad right of way through Niles Canyon. (Exception No. 13.)

14. The court erred in denying plaintiffs' motion for a new trial for insufficiency of the evidence to support the finding as to such easement, or the finding as to the necessity therefor; for the error of law in subjecting the railroad right of way grant of July 1, 1862, to the terms of the Act of Congress approved March 3, 1875; for the error of law in subjecting the title of plaintiffs to the necessity or convenience of defendant County of Alameda: for the other errors of law occurring at the trial, excepted to by plaintiffs, and set forth in the bill of exceptions. (Exception No. 14.)

SPECIFICATIONS OF INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE DECISION

1. The evidence is insufficient to sustain the implied finding that there is any relation between old county road survey No. 247 and the present traveled highway through Niles Canyon.

2. The evidence is insufficient to sustain the finding that [fol. 182] it cannot be ascertained whether the survey for road 247 is identical in any particular with County Road No. 4974.

On the contrary, the evidence shows without conflict that there is no agreement whatever between Survey No. 247 and County Road No. 4974.

3. The evidence is insufficient to sustain the finding that topographical, geographical or other physical features or conditions in Niles Canyon make it practically necessary to maintain the county highway within the railroad right of way through Niles Canyon.

4. The evidence is insupcient to sustain the finding that the highway within the railroad right of way through Niles Canyon is necessary for public accommodation.

5. The evidence is insufficient to sustain the finding that the County of Alameda has or owns an easement for highway purposes by reason of necessity or otherwise within the railroad right of way through Niles Canyon.

[fol. 183] IN SUPERIOR COURT OF ALAMEDA COUNTY

STIPULATION AS TO BILL OF EXCEPTIONS

It is hereby stipulated that the foregoing bill of exceptions is full, true and correct; that the same contains all the evidence material to the issues presented therein, and that the same may be settled and allowed by the court.

Dated April 21, 1928.

Frank Thunen, Attorney for Plaintiffs: Earl Warren, District Attorney; Paul St. Sure, Assistant, Attorneys for Defendants.

IN SUPERIOR COURT OF ALAMEDA COUNTY

CERTIFICATE TO BILL OF EXCEPTIONS

I hereby certify the foregoing to be a full, true and correct bill of exceptions in the foregoing entitled cause; that the same contains all of the evidence material to the issues presented therein, and that the same is hereby settled, allowed and approved this 23rd day of April, 1928.

Eugene P. McDaniel, Judge.

[File endorsement omitted.]

[fol. 184] IN SUPERIOR COURT OF ALAMEDA COUNTY

STIPULATION AS TO TRANSCRIPT

It is hereby stipulated that the foregoing transcript on appeal is correct; that it contains full, true and correct copies of all papers and documents therein set forth and now on file in the office of the clerk of the County of Alameda, State of California; that the said transcript contains

a full and accurate copy of (1) the Judgment Roll, (2) the notice of appeal, and (3) the Bill of Exceptions heretofore settled by stipulation of the attorneys, and the certificate of the judge who tried the said cause: that the said foregoing papers shall constitute the transcript on appeal from the final judgment in this cause, which said judgment was rendered on the 17th day of August, 1927, and filed in said cause on August 19, 1927.

Dated June —, 1928.

Frank Thunen, Attorney for Plaintiffs and Appellants; Earl Warren, District Attorney; Paul St. Sure, Assistant, Attorneys for Defendants.

[fol. 185] Received a copy of the within Transcript on Appeal for the judge who presided at the trial of said cause.

Dated June 6th, 1928.

George E. Grass, Clerk. T. C. Stoddard, Deputy.

Due service of the within Transcript on Appeal is hereby admitted this 6th day of June, 1928.

Earl Warren, J. Paul St. Sure, Assistant, Attorneys for Respondents.

[fol. 186] In Supreme Court of California, Bank

1 Civ., 6871. S. F., 13041

Central Pacific Railway Company et al., Plaintiffs-Appt's,

vs.

County of Alameda, etc., et al., Defendants-Resp's

Order Transferring Cause—Filed Oct. 28, 1930

By the Court:

In the above entitled cause, now pending in the District Court of Appeal for the First Appellate District, and numbered therein 1st Civil 6871, copies of the several opinions in writing of the justices of said court having been forwarded to this court, and it appearing therefrom that said justices are unable to concur in a judgment in said cause,

It is ordered that the said cause be, and the same is hereby, transferred to this court for hearing and determination.

Waste, Chief Justice.

Dated October 28, 1930.

[File endorsement omitted.]

[fol. 187] IN SUPREME COURT OF CALIFORNIA

S. F. 13041. In Bank. April 27, 1931

CENTRAL PACIFIC RAILWAY COMPANY (a Corporation), and Southern Pacific Company (a Corporation), Plaintiffs and Appellants,

v.

COUNTY OF ALAMEDA (a Body Politic and Corporate), Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats, and William J. Hamilton, Members of the Board of Supervisors of said County; John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow, and Frederick Stow, Defendants and Respondents

[1] Highways—Public Lands—Counties—Railroads—Right of Way—Public Land Grants.—In this action by a railroad to quiet title to land upon which defendant county had maintained a highway since the year 1859, and which [fol. 188] was included in land granted to plaintiff by the so-called Pacific Land Grant Act enacted by Congress in 1862, plaintiff could not complain that the county had no authority to construct the road across public lands until the year 1866, which was after the grant to plaintiff, where the federal government had never objected to the construction or maintenance of the road.

[2] Id.—Railroads—Right of Way—Eminent Domain—Adverse Possession—Easements.—In such action, where the road was constructed through a deep canyon, and it appeared that the road had been maintained continuously in the same place since its construction, except for a portion which had been washed out by the stream in the canyon

and which had been replaced by a new road, which abandonment and construction occurred in the year 1911, and the highway had been improved by the expenditure of more than $100,000, and plaintiff did not object to the maintenance of the highway until the year 1925, and the maintenance of the highway in no manner interfered with the use of the land for the purpose for which it was given to plaintiff, the county had not only gained an easement by adverse user, but, under the circumstances, was entitled to an easement for the highway in its present location by reason of necessity and public convenience, the topography of the land being such that the construction of a highway which would not cross the land belonging to plaintiff would be extremely difficult, and, if constructed, would not best serve the public.

[3] Id.—Railroads—Right of Way—Statutory Construction.—In such action, where the county was entitled to maintain the highway over the easement gained by adverse user, it was immaterial whether or not an act of Congress of 1875, granting the public the right to occupy the unused portion of a railroad right of way granted by the government, through a canyon or defile, such as involved in the present action, where such highway is necessary for public accommodation, could be given a retrospective effect so as to entitle the county to maintain the highway over the right of way granted to plaintiff in 1862.

Appeal by plaintiffs from a judgment of the Superior Court of Alameda County, Eugene P. McDaniel, Judge, in an action to quiet title. Affirmed.

For Appellants: Frank Thunen.

For Respondents: Earl Warren, District Attorney of Alameda County; Paul St. Sure, Deputy District Attorney.

OPINION

By the COURT:

This case was appealed to this court and thereafter transferred to the District Court of Appeal in and for the First District. It was then assigned to Division One of said District Court of Appeal, and later transferred to this court for the reason that the concurrence of two jus-

tices of said District Court of Appeal in a judgment therein could not be obtained. Upon its submission to us we have carefully examined the briefs of counsel filed in the case and the opinions of the several members of the District Court of Appeal prepared by them when the appeal was before that court. After this examination we have arrived at the conclusion that the opinion of Mr. Justice Knight of said District Court of Appeal correctly expresses the views of this court upon the questions presented on this appeal, and we have therefore adopted said opinion, with slight modifications, as the opinion of this court. The opinion as thus approved and adopted by this court is as follows:

"The essential facts appearing in the record are as follows: For approximately seventy years the county of Alameda has maintained a public highway through and along the bottom of the Niles canyon from Niles to Sunol. It was laid out and declared to be such by the county in 1859, and has since served as one of the main arteries of travel between the bay regions of southern Alameda county and the Livermore valley. The canyon from Stony Brook, [fol. 189] about two miles east of Niles, easterly to Sunol is narrow, deep, rugged, about three miles long, and through it runs the Alameda creek; and owing to its steep cliffs it is impracticable to maintain a highway through it except along the bottom thereof. In 1862 Congress enacted the so-called Pacific Land Grant Act, whereby the Central Pacific Railroad Company was granted a right of way 400 feet wide over and across government lands in California to the Pacific coast, for the purpose of constructing along the center thereof a railroad and telegraph line to serve as a link in the first transcontinental railroad. Part of the route selected by said company was through the Niles canyon, which was then unappropriated public land; but on account of the narrowness of the canyon the right of way selected necessarily embraced within its boundaries part of the land occupied by the Alameda county highway. In 1868 said company finished building a single-track railroad through the canyon, over which it has since operated its trains; but the construction and operation of the railroad has never interfered with the free use of said highway.

"In 1910 or thereabouts, on account of the flood waters of the creek, the county was obliged to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way; and in 1911 the discontinued portions were formally abandoned by the county, so that at the time this action was instituted the highway lay within the boundaries of the railroad right of way for a distance of about a half mile at the westerly end of the canyon and for the distance of about a mile and a half at the easterly end of the canyon. It also overlaps the right of way slightly at a point between the two stretches above mentioned and near the westerly end of the canyon; and it appears from appellants' map (plaintiffs' exhibit No. 6) that the highway crosses the railroad track twice, once at the extreme westerly end of the canyon, near Stony Brook, and again about a half mile west of the easterly end of the canyon. Since 1911 the county has expended more than $100,000 for the upkeep and improvement of said highway.

"In 1925 the appellant railroad companies brought this action to obtain a decree establishing in them title in fee simple to and right to the exclusive possession of those portions of the right of way now occupied by the public highway, and to oust the county therefrom, claiming that such title and right of possession was acquired by the Central Pacific Railroad Company under the Pacific Land Grant Act of 1862. The answer of the county urged, among other defenses, that by virtue of the facts above stated it had acquired an easement by reason of necessity over those portions of said right of way now occupied by its highway, and it asked for a decree accordingly.

"The trial court sustained the county's claim to such easement, finding in this regard that said highway was a public necessity and that 'the topographical, geographical and other physical features and conditions existing in the disputed portions of the right of way through Niles canyon, viz: the narrowness of the canyon, proximity of Alameda creek, which in the winter season becomes a torrential stream, sometimes capable of destroying bridges and roadways, and the steep sides of the canyon, make it practically necessary to maintain the highway through the dis-

puted territory because of the overwhelming difficulties to [fol. 190] substitute a different route in those places where the road is within the 200 foot limit from the center line of the main track of the railroad. * * *' It also found that except for those portions formally abandoned, the county in rebuilding the highway in 1910 or thereabouts followed substantially the line of the then existing road; but that it could not be ascertained from the evidence how much of the then existing road followed the line of the road constructed under the proceedings of 1859.

"After leaving the canyon the highway continues on easterly into San Joaquin county, following generally along and portions of it lying within the railroad right of way, title to which, and to a by-road intersecting the main highway near Stony Brook, appellants sought also by this action to quiet, and were granted an unqualified decree accordingly. But we are not concerned with that part of the decree on this appeal, because the county admits that beyond the walls of the canyon the topographical and other physical conditions are such as to make it unnecessary for the highway to occupy any portion of the railroad right of way.

"The trial court's conclusions of law were that the Central Pacific Railway Company is the owner of the paramount title in fee to the land now occupied by said highway and lying within the boundaries of said 400-foot right of way, 'subject to an easement in favor of defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes * * * subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled 'An act granting to railroads the right of way through the public lands of the United States' (18 Stats. 482), declaring 'and the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass or defile, said railroad company shall,

before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road.' "

"Judgment was entered in conformity with the foregoing conclusions of law, and in applying the provisions of the Act of 1875 it was decreed that 'pursuant to the terms of said act of Congress, and under the paramount title of plaintiff Central Pacific Railway Company, plaintiffs may enter upon the whole or any part of all or any of said (three) parcels of land (lying within said right of way and designated in the findings as parcels D, E and F) and exclude the defendants and all thereof, and all persons claiming to or to claim under the defendants or any thereof, from the possession of the whole or any part of all or any of said parcels hereinabove designated as parcel D, parcel E and parcel F; provided, however, that plaintiffs shall first reconstruct, at their own expense or at the sole expense of either thereof, in the most favorable location and in as perfect a manner as the original road, such portion or portions of the said original road as may be repossessed by the plaintiff to the exclusion of the defendants.'

[fol. 191] "The record shows beyond question that all of the proceedings for the establishment of a public highway from Niles to Sunol were taken by the county and completed long before the enactment of the Pacific Land Grant Act of 1862, and consequently long prior to the time the railroad acquired any rights whatever in the canyon. In this regard the trial court found 'that in the year 1859 defendant Alameda County surveyed and laid out through the Niles canyon, under survey No. 247, a county road which was the same year declared by the board of supervisors of said county to be a public highway'; and part of the evidence supporting the finding shows that pursuant to a petition presented to the board in November, 1858, survey No. 247 was made by the board and filed in May, 1859; and that after due notice and hearing the board declared the road as surveyed and located to be a public highway and directed that it be opened forthwith. The proceedings above mentioned substantially complied with the requirements of the earlier statutes under which public highways were established (Stats. 1850, p. 200;

Stats. 1855, p. 192); and there would appear to be nothing in the record to justify the belief, as appellants claim, that the highway contemplated by survey No. 247 was never constructed, unless, perhaps, it be the map prepared by appellants' engineers and introduced in evidence as part of appellants' case (plaintiffs' exhibit No. 6), which places the line of the road up along the side of the canyon, where no trace of a road could be found. But the correctness of the line delineated on said map may be seriously doubted in view of the testimony showing the impossibility of relocating the line of the road laid out by the old survey with any degree of certainty from the notes thereof, because the survey was made pursuant to methods long since discarded as inaccurate; and furthermore, the monuments to which the survey was tied have long since disappeared. In opposition to the map and as showing that a highway was constructed pursuant to the survey of 1859 the record discloses the uncontradicted testimony of two old settlers, one of whom had been a resident of Sunol since 1858, and who testified that he traveled over the completed road through the canyon in 1862 and continuously thereafter. The other had been a resident of Niles since 1863, and he testified that he traveled over the completed road through the canyon as early as 1863 and continuously thereafter; and both testified that except for changes necessitated by the flood waters of the creek, which resulted in shifting a portion of the road from the north to the south side of the creek, the line of the present road corresponds in every particular with the old road as they traveled it in the early sixties. These changes were covered by the abandonment proceedings in 1911. And the trial court found in effect, and the evidence shows, that although the highway called for by survey No. 247 did not remain in its original location throughout its entire length, the 'parts of the old road numbered 247 not expressly abandoned by the board of supervisors on said date (March 27, 1911) and not included within the limits of the county road No. 4974 (constructed in 1911) are part of the present traveled road'.

[1] "True, the original highway was built over government land prior to the passage of the congressional act of 1866, which for the first time granted rights of way 'for the construction of highways over public lands not

reserved for public use'; but the government has never [fol. 192] objected to the legal status of the highway, and as said in the case of Town of Red Bluff v. Walbridge, 15 Cal. App. 770, in dealing with a similar situation: 'As against the federal government it (the county here) could not perhaps make a public highway over its lands without its consent or acquiescence, but the federal government is not complaining, and its policy has always been to encourage the building of highways over the public domain, thereby facilitating its settlement and use, and this policy was crystallized into a statute passed on the 26th day of July, 1866. * * *'

[2] "Appellants contend, however, that the effect of the intervening Land Grant Act of 1862 was to extinguish any prospective rights the county may have acquired to a public highway through the canyon and to vest absolutely in the railroad exclusive ownership in fee of a right of way 400 feet wide through the canyon, no part of the area of which was thereafter subject to easement by the county; and that, therefore, notwithstanding the urgent necessity for the easement and the admitted fact that the railroad company knowingly allowed the highway to remain on those portions of its right of way now in dispute and to be traveled continuously for upwards of sixty years, and to be improved by the expenditure thereon of more than $100,000, the county acquired no rights whatever therein. I cannot agree with appellants' contention in this respect.

"As to the nature and extent of appellants' title, it may be stated that the Land Grant Act of 1862 was one of several passed by Congress in the early sixties, granting unto various railroads rights of way over government lands, and in all of them the language used in granting the rights of way and in specifying the conditions upon which the grants were made are substantially the same. These acts have been construed at different times by the federal and state courts, and while no case identical in facts to those here presented has been cited, the legal principles employed in those cases in measuring the extent of the title granted by said acts must necessarily be applied here in determining the rights of the respective parties; and when so applied clearly demonstrate, in my opinion, that no such absolute title to or right of exclusive possession in the public domain

as is here claimed was ever acquired by or intended to be granted to the railroads under said acts, for if it were, the investiture of such title would have barred the public from ever afterwards encroaching in any manner upon any portions of any of said rights of way, notwithstanding that such encroachments were of urgent public necessity and would in no manner interfere with the special purpose for which said rights of way were granted to the railroads. Obviously such is not the law, as the authorities hereinafter cited will show. The contention of exclusive ownership here made was heretofore advanced by the Union Pacific Railroad Company with reference to the title it acquired under this very Act of 1862, in the early case of Union Pac. R. R. Co. v. Leavenworth etc. Ry. Co., 29 Fed. 728, wherein it sought to prevent the construction of a crossing over its right of way; and in ruling adversely upon such contention Judge Brewer said: 'Even if it were conceded that Congress had the power to enter the territory of a state and, for any purpose, establish a line through its center over which the state had no right of crossing—a sort of Chinese wall, dividing the state into two portions, inaccessible to each other, a concession I should never be willing to make—it is clear to my mind that [fol. 193] no assertion of such power was ever contemplated by Congress in the Pacific railroad legislation.'

"It is conceded that whatever measure of title the government granted vested in praesenti as of the date of the approval of the acts (Railroad Co. v. Baldwin, 103 U. S. 426; Union Pac. R. R. Co. v. Laramie Stock Yards, 231 U. S. 190); also that no adverse title can be acquired by the public in said rights of way which might have a tendency to impair or destroy the full enjoyment thereof by the railroad companies (H. A. and L. D. Holland Co. v. Northern Pac. Ry. Co., 214 Fed. 920). Furthermore, up to 1912 (at which time an act of Congress was passed, as will hereinafter appear, affecting the title granted to the Union Pacific Railway Company) it was held that under no circumstances could an individual or other private interest acquire title by adverse possession to any portion of said rights of way (Northern Pac. Ry. Co. v. Townsend, 190 U. S. 267). But manifestly by granting said rights of way the government did not divest itself of all ownership therein. As held in the Townsend case, supra, which involved a construction of the act of 1862: "In effect the grant was one of a limited fee,

made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted''; and in further limitation of the fee the courts have held that neither the whole nor any portion of the rights of way thus granted may be alienated by the railroads, nor voluntarily dedicated by them to any public use (Holland case, supra); and by the terms of the act of 1862 itself it is provided that '* * * Congress may at any time having due regard for the rights of said (railroad) companies named herein, add to, alter, amend, or repeal this act.' Moreover, it has been consistently held that in the cases of public necessity such rights of way are at all times amenable to the police power of the state and subject to the state's right of eminent domain, provided that in the exercise thereof the special purpose of the grant to the railroad is not thereby impaired. In this regard the Townsend case, supra, declares: 'Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed * * *' The Holland case, supra, holds to the same effect, it being there said: 'Upon the one hand, the implication is clear that Congress intended that the right of way should be held and used exclusively for railroad purposes, and upon the other, it is fair to assume, it was not desired that the use be in disregard of the rights and convenience of those who should take up their abode along its course. It must have been contemplated that highway and other crossings would, in the very nature of things, be required, and in view of the self-evident need therefor, together with what must have been a common and well-understood practice of making provision for them in railroad operation, it is reasonable to suppose that the grant was made with the implied consent that ways of necessity, both public and private, might be laid out across the right of way at such places and under such conditions as would not unreasonably impair its usefulness for [fol. 194] the purpose for which it was created.' Again, in

the case of Union Pacific R. R. Co. v. Leavenworth etc. Ry. Co., supra, it is expressly held that the rights of way granted under the act of 1862 are not placed beyond the reach of the power of the state's right of eminent domain, citing several earlier cases. And in the case of North Coast Ry v. Northern Pacific Ry. Co., 48 Wash. 529, the same doctrine is definitely restated as follows: 'It has also been repeatedly held by other courts that a right of way of a railroad company, which has been acquired for that express purpose through a federal grant, is not exempt from the operation of state laws of eminent domain. (Northern Pac. R. Co. v. St. Paul etc. R. Co., 1 McCrary 302; Union Pac. R. Co. v. Burlington etc. R. Co., 1 McCrary 452; Union Pac. R. Co. v. Leavenworth etc. R. Co., 29 Fed. 728; Illinois Cent. R. Co. v. Chicago etc. R. Co., 26 Fed. 477.)' Additional cases to the same effect are Union Pacific R. Co. v. Burlington etc. R. Co., 3 Fed. 106; Northern Pac. R. Co. v. St. Paul etc. R. Co., 3 Fed. 702; Northern Pac. Ry. Co. v. Spokane, 64 Fed. 506. In fact, as said in the Leavenworth etc. Ry. Co. case, supra, the question of the power of the state to exercise the right of eminent domain, under the conditions above stated, as to the right of way of a railroad granted by the government 'can hardly be considered as an open one'. Therefore, if under the state's police power, and subject to the conditions above stated, the public may acquire easements in railroad rights of way over government lands, through the exercise of the right of eminent domain, it would seem wholly illogical to hold in the present case that the same character of easements, subject to the same conditions, may not be acquired by the public by adverse user extending over a long period of years, without being compelled in the end to resort to the legal proceedings incident to the exercise of the right of eminent domain; because the right to the easement is founded on the doctrine of public necessity, and if it be entitled to the easement as a matter of right, the method of its acquisition would seem to be of little consequence so long as it conformed to the requirements of local state laws.

"Appellants contend, however, that the principle of the cases relied upon by the county to sustain its claim to an easement has no application here because those cases involve only crossings over the rights of way as distinguished from longitudinal or parallel encroachments such as we have here; and in this regard it is said that 'no case has

been called to our attention which would in the slightest degree justify the encroachment here in question'. It would seem, however, that the case of North Coast Ry. Co. v. Northern Pac. Ry. Co., supra, is just such a case. There the latter company, like the Central Pacific here, was one of the grantees named in one of these land grant acts; and it selected a right of way and laid its track along the Yakima river, through a deep, narrow, mountain ravine in the state of Washington. The North Coast Railway Company sought to parallel said track for a limited distance through the ravine, over the unused portion of and within the boundaries of the other railroad's right of way, there being no other feasible route over which the North Coast Company could build the road; and it was contended there, as it is here, that the rule governing crossing cases had no application to longitudinal encroachments. But the court held directly to the contrary, saying: 'It is true the most, if not [fol. 195] all, of the last-cited cases related to crossings of other railways over a right of way acquired by federal grant, whereas the tract here sought is not for mere crossing purposes but is a longitudinal tract about three-fifths of a mile in length, to be carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railway and those of the public service. This court has held that a longitudinal portion of a right of way may be condemned by another railway corporation where the occupying railway does not actually need it, and where it is needed by the other in the interest of the public service. Seattle & Montana R. Co. v. Bellingham Bay & Eastern R. Co., supra. It is, therefore, held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the necessities of the two companies in the interest of the public service is sufficient to warrant it.'. And in construing the language hereinabove quoted from the Townsend case, the court said: 'It seems clear from the quotation last made that the Federal Supreme Court recognizes the power of the state to determine whether the whole of a right of way which has been created by Federal grant through an act of Congress is actually needed as against the requirements of public serv-

ice, which arise with the increase of commerce and transportation necessity.'

"An analysis of the decision in the case of H. A. and L. D. Holland Co. v. Northern Pac. Ry. Co., supra, cited by appellants as sustaining their position, shows that it is not at variance with the foregoing views. The vital point there decided was that the grant to the railroads of a limited fee in rights of way over government lands carried with it no power to dedicate any portion of said rights of way for use as public streets or townsites; and that no individual claim of ownership in such rights of way, based upon an attempted dedication could be sustained; nor under such circumstances could the railroad company be estopped from afterwards asserting the full measure of the title granted to it by the government. It is true that in that particular case the court refused to apply the rule governing crossing cases to the longitudinal encroachment there involved; but the reason for such refusal was, as the decision clearly shows, that the element of public necessity for the encroachment, upon which the doctrine of the crossing cases is founded, was entirely lacking; but nowhere in the decision does the court pretend to declare a general rule that all longitudinal encroachments are to be excluded from the operation of the rule governing crossing cases. On the contrary, the court in this regard said: 'We do not say that a case is inconceivable where, for a limited distance, some concession may not properly be made for this or an analogous purpose (a longitudinal encroachment); but the necessity must be great and the conditions unusual in the extreme to warrant it.' In the case at bar the findings and the evidence show beyond question an imperative necessity for the Niles Canyon highway, because besides furnishing the sole means of ingress to the property situate along the railroad within the canyon, it serves as the only feasible way of uniting two important and well-populated regions of the state, and therefore is vital to their development and progress.

"Furthermore, in the Holland case, one of the reasons suggested why the rule governing crossing cases should not be extended generally to longitudinal encroachments was that the latter imposed 'a much greater burden than a mere

[fol. 196] crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use.' If the term 'greater burden' was there used in a legal sense, the correctness of the statement cannot be challenged; but if thereby the court meant that generally speaking all longitudinal encroachments create a greater physical burden on said rights of way than crossings, there is much room for difference of opinion, because it is a matter of common knowledge, in this day of heavy and continuous automobile traffic over the highways of the state, both for commercial purposes and pleasure, that highway crossings over railroads are a constant menace to life and property, and that vast sums of money are being expended daily by the railroads, the state, and the counties, jointly, to eliminate such crossings; whereas no such danger surrounds longitudinal encroachments such as we have here. Therefore it would seem to be an unreasonable rule which would hold that where the highway crosses the railroad track, with all of its attending dangers, it constitutes a lawful encroachment, but where for a limited distance it runs parallel with the track and is not surrounded with the dangers of a crossing, it constitutes an unlawful encroachment. Furthermore, as already shown, the fundamental reason for the rule permitting crossings in any case is to prevent one part of a state from being walled off from another; and it follows necessarily that if it be essential to unite two areas of the state with a highway, it can make little difference in principle whether in so doing the connecting highway be laid across the railroad track in an open country or parallel with the track for a short distance, through a mountain pass or ravine; and certainly the latter is attended with far less dangers, both to the railroad company and the public, than a crossing.

"In further support of the theory that a public easement may not be acquired by adverse user, appellants quote from the Townsend case, supra, which in turn quotes from the case of Northern Pac. R. R. Co. v. Smith, 171 U. S. 260, to the effect that 'by granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance,' and that such determination is not open to judicial review. But the rule there stated is

restricted by the express language of both decisions to cases of individuals claiming title by adverse possession for private purposes, as distinguished from cases of the public claiming adverse title by reason of public necessity. In this regard the decision in the Townsend case, supra, reads: 'The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.' And in the case of Northern Pacific R. R. Co. v. Smith, supra, the restrictive wording of the decision is: 'By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant,' etc. The cases of Southern Pacific Co. v. Hyatt, 132 Cal. 240, and Heilbron v. St. Louis S. W. Ry. Co., 52 Tex. Civ. App. 575, 113 S. W. 610, were [fol. 197] likewise actions brought by individuals to establish title by adverse possession, for private purposes. And the rule quoted from Jones on Easements is not pertinent here for the reason that none of the cases cited by the author of that work, in support of the rule, relate to railroad rights of way over government lands. Appellants rely upon language found in the Holland case, supra, to the effect that the 'entire right of way' of the railroad can neither be condemned nor dedicated for street purposes. Such, no doubt, is the established law, the reason therefor being that condemnation or dedication of the entire right of way would defeat the very purpose for which the right of way was granted to the railroad. But this element does not enter into this case, for as shown the action here is purely one to quiet title, based upon the claim of exclusive ownership, and consequently nowhere in their complaint do appellants allege or claim that the existence of said highway ever has interfered with the operation of their railroad, or their program of railroad expansion, nor that it is likely to do so in the future.

[3] "Furthermore and aside from the doctrines of eminent domain and adverse user above discussed, the provisions of the act of 1875 quoted above expressly confer upon the public the right to occupy the unused portion of a rail-

road right of way granted by the government, through a canyon or defile, such as we have here, where such highway is necessary for public accommodation. Appellants contend, however, that the provisions of that act cannot apply here unless they be given retrospective operation, which legally may not be done, the contention being based mainly upon the proposition that the grant of the right of way to the railroad under the act of 1862 vested instanter upon the approval of said act, and that therefore Congress had not the power subsequently to enact legislation affecting said grant; and the cases of Union Pacific R. R. Co. v. Laramie Stock Yards, supra, and Union Pacific R. R. Co. v. Snow, 231 U. S. 204, have been cited as supporting this proposition. I do not understand such to be the effect of the decision in either of those cases. On the contrary it appears therefrom that in 1912 Congress did enact legislation which had the direct effect of depriving the Union Pacific R. R. Co. of certain unused portions of the rights of way previously granted to it under this very act of 1862, and the right of Congress so to do was not challenged. In this regard, the court in the Laramie Stock Yard case first points out that under the act of 1862 the grantee railroads had no power to alienate any portion of their rights of way, nor individuals or other private interests acquire title to any portion thereof by adverse possession; and the court then goes on to say that in order to correct 'this defect of power in the companies and the defect of right in the possessors of the right of way' the act of 1912 was enacted, (which as stated was limited in its operation to the Union Pacific R. R. Co.) and which provided first that all conveyances and agreements 'theretofore made' by the Union Pacific R. R. Co. or its successors or assigns of or concerning land forming part of its right of way under the act of 1862, etc., were legalized, validated, and confirmed, etc.; and secondly, that in all instances in which title or ownership of any part of said right of way theretofore mentioned was 'claimed' as against said company or its successors or assigns, 'by or through adverse possession of the character and duration prescribed by the laws of the state in [fol. 198] which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead

of being granted as a right of way.' But as will be seen from an examination of the opinion in that case, the question there raised and decided was not whether in 1912 Congress had power to pass laws affecting rights of way previously granted, but, first, whether the act of 1912 controlled as to conveyances and agreements made by the grantee railroad prior to the approval of said act as well as to those made subsequently; and secondly, whether the provisions of the act of 1912 conferring upon individuals the right to acquire title against the railroad by adverse possession, applied to cases where the period of the statute had run, fully or in part, prior to the time of the approval of the act, or only to those cases where the full period of the statute had run subsequent to the approval of the act. And it was held that because of the explicit language used in the act relating to conveyances and agreements 'theretofore made' by the railroad, the provisions thereof validating such conveyances and agreements were to be given a retrospective operation; but that in the absence of any such qualifying language relating to the acquisition of the title by adverse possession the provisions of the statute having reference thereto were to be given a prospective operation; in other words, that the latter provisions were available only in those cases where the full requisite statutory period of adverse possession had run subsequent to the approval of said act, and not in cases where such period of time had run either fully or partly prior to the approval of the act. In both of the cases cited the full period of time fixed by the statute had run prior to the approval of the act, but admittedly had not run subsequent thereto (the causes having been submitted to and decided by the Supreme Court in 1913, about a year after the approval of the act). Consequently the judgments there under review which were based upon those admitted facts were reversed. But in neither case was it held, as appellants contend, that the provisions of the act of 1912 were inoperative and ineffectual against rights of way previously granted under the act of 1862; and indeed such a conclusion would have been directly contrary to the very purpose and the express language of the 1912 act. It follows, therefore, that if in 1912 Congress had power to enact valid legislation controlling the right of possession to unused portions of rights of way granted by the government under the act of 1862,

it was surely vested with the same power in 1875. And a comparison of the two acts will demonstrate that the act of 1875 was far less reaching in its effect against the railroads than the act of 1912, because obviously the purpose and effect of the act of 1875 was to confer upon the railroads the power to take or retake exclusive possession of the entire area of the rights of way and to oust the public therefrom, provided they complied with the conditions stated in the act; while the manifest purpose and effect of the provisions of the act of 1912 relating to adverse possession was to deprive the railroad permanently of those portions of its right of way which it had permitted individuals to occupy adversely for the limited statutory period, the theory upon which this subsequent legislation was evidently based being that only a limited fee in said rights of way was granted to the railroads in the begin- [fol. 199] ning and that the remainder of the fee was reserved in the government, over which it still had the right of control and disposition.

"Appellants further contend that the language employed in the enactment of the statute of 1875 shows that its provisions were not intended to apply to rights of way granted under the previous special land grant acts such as the act of 1862. While there is much force in the argument advanced in support of this contention, it would appear that there is reasonable ground for sustaining the trial court's conclusion to the contrary. But even assuming that the act of 1875 does not so apply, the county is nevertheless clearly entitled to a decree under the doctrine of adverse user, establishing its easement in those portions of the right of way now occupied by its highway, leaving for further determination the question of the superior need of those portions of the right of way, in case appellants should claim that the same were essential to the convenient operation of its railroad. As said in the Holland case, supra, 'Public use implies an underlying necessity, and the fundamental consideration, therefore, is that of superior need.'

"Appellants in their briefs have signified a willingness to enter into an agreement with the county to allow the highway to remain in its present location, provided the county recognizes appellants' exclusive title to the land occupied thereby and their right to exclude the county

therefrom whenever they deem such land necessary for the convenient operation of their railroad. But according to the cases heretofore cited, it may be seriously questioned whether under the terms of their grant appellants have the power to enter into any such agreement; and it is also extremely doubtful whether the county, being given only a 'limited right of user' of the disputed land, would have any legal right to expend any public funds whatever for the improvement of a road over the railroad's property. In any event, the legal rights of the respective parties will be hereafter measured by the terms of the judgment to be rendered in the action, rather than by anything which may be stated in the briefs, and in this regard it must be remembered that appellants are seeking a decree to quiet title to the disputed portions of the right of way and to oust the county therefrom. Therefore, conceding the good faith of the propositions made in appellants' brief, the determination of the legal problem here presented cannot be affected or influenced thereby."

The judgment is affirmed.

[fol. 200] IN SUPREME COURT OF CALIFORNIA, IN BANK

S. F. No. 13041

CENTRAL PACIFIC RAILWAY CO.

vs.

COUNTY OF ALAMEDA, etc.

ORDER DENYING REHEARING—Filed May 25, 1931

By the COURT:

The petition for a rehearing in the above entitled cause is denied.

Dated May 25, 1931.

Seawell, Acting Chief Justice.

[File endorsement omitted.]

[fol. 201] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 202] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1931

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,072. California Supreme Court. Term No. 258. Central Pacific Railway Company and Southern Pacific Company, petitioners, vs. County of Alameda, Chas. W. Heyer, Ralph Richmond, et al., etc. Petition for a writ of certiorari and exhibit thereto. Filed July 24, 1931. File No. 36,072.

FILE COPY

FILED

JUL 24 193

CHARLES ELMORE CR
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the BOARD OF SUPERVISORS OF SAID COUNTY, John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow, *Respondents and Respondents below.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

C. F. R. OGILBY,
1422 F. Street, N. W.,
Washington, D. C.
FRANK THUNEN,
65 Market Street,
San Francisco, Calif.
Attorneys for Petitioners.

GUY V. SHOUP,
65 Market Street,
San Francisco, Calif.
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI....	1
Summary Statement of Matter Involved.....	2
Reasons for Allowance of Writ.....	4
Prayer for Writ.....	4
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.....	6
Opinion of the Court Below, 81 Cal. Dec. 652, ... Pac.	6
Jurisdiction	6
Statement of the Case	10
Specification of Errors	12
Summary of the Argument.....	13
Argument	13
1. The Effect of the Act of Congress Approved March 3, 1875 (18 Stat. 482) as Amendatory of Special Grants Theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It Was not Within the Intent or the Power of Congress to Impair Vested Title.	14
Authorities:	
Railway Company vs. Alling (Oct. Term 1878) 99 U. S. 463, 479	15
Sinking Fund Cases, 99 U. S. 700, 719, 757	14
Union Pacific R. R. Co. vs. Laramie Stock Yards, 231 U. S. 190, 200	18

Page

Union Pacific R. R. Co. vs. Snow, 231 U. S. 204 18
United States vs. Denver & Rio Grande Railway, 150 U. S. 1, 10 17
Act of June 8, 1872 (17 Stat. 399) 17
Act of March 3, 1875 (18 Stat. 482) 17

2. The State Police Power and the Power to Acquire Highway Rights by Adverse User Could not Extend Beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920 (41 Stat. 621) the Railroad Company Had no Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant 19

Authorities:

Barnes vs. Southern Pac. Co., 16 Fed. (2nd.) 100, 104 25
Heilbron vs. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613) 26
Holland Co. vs. Nor. Pac. R. R. Co., 208 Fed. 598, 603 21
Holland Co. vs. Nor. Pac. R. R. Co., 214 Fed. 920, 926 4
Kindred vs. Union Pacific R. R. Co., 225 U. S. 582 20
Leavenworth etc. Ry. Co. vs. U. S., 92 U. S. 733, 748-749 21
Mulvihill vs. S. P. Co., 16 Fed. (2nd.) 100, 104 25

Page

Nadeau vs. Union Pacific R. R. Co., 253 U. S. 442 20
North Coast Ry. vs. Nor. Pac. Ry. Co., 48 Wash. 529, 94 Pac. 113 19
Nor. Pac. R. R. Co. vs. Smith, 171 U. S. 261 22
Nor. Pac. Ry. Co. vs. Townsend, 190 U. S. 267, 271 22
Olcott vs. Board of Supervisors, 16 Wall. 678 23
Railway Co. vs. Alling (Oct. Term 1878) 99 U. S. 463, 479 4
Sinking Fund Cases, 99 U. S. 700 14
Southern Pac. Co. vs. Hyatt, 132 Cal. 240, 242, 244 23
United States vs. Denver & Rio Grande Ry., 150 U. S. 1. 4
Williams, Mayor, et al. vs. Atlantic Coast Line R. Co., 17 Fed. (2nd.) 17, 21 24
Interstate Commerce Act, Sec. 1 (Subdv. 18) 23
Jones on Easements, Sec. 281, p. 232 ... 4

3. There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, Nor Until Four Years Thereafter. The County of Alameda Did Not Adopt the Traveled Way as a County Road. Any Claim of the County to the Traveled Way Was Renounced by the State in the Legislative Acts of May 1, 1852, and April 4, 1864. 26

Page

Authorities:

Railroad Co. vs. Baldwin, 103 U. S. 426 28
Town of Red Bluff vs. Walbridge, 15 Cal. App. 770 26
Tucson Consolidated Copper Co. vs. Reese (Ariz.), 100 Pac. 777, 778 28
Act of July 1, 1862 (12 Stat. 489) Sec. 12 8
California Statute of April 26, 1858, Sec. 1 28

Conclusion 29

TABLE OF CASES CITED.

Barnes vs. Southern Pacific Company, 16 Fed. (2nd.) 100, 104 25
Carlson vs. Curtis, 234 U. S. 103 10
Dana vs. Dana, 250 U. S. 220 10
Erie R. R. Co. vs. Hamilton, 248 U. S. 369 10
Gauthier vs. Morrison, 232 U. S. 452 10
Grayson vs. Harris, 267 U. S. 352 10
Green Bay etc., Canal Co. vs. Patten Paper Co., 172 U. S. 58 10
Heilbron vs. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613) 26
Holland Co. vs. Nor. Pac. R. R. Co., 208 Fed. 598, 603 21
Holland Co. vs. Nor. Pac. R. R. Co., 214 Fed. 920, 926 4
Jordan vs. Tashiro, 278 U. S. 123 10
Kindred vs. Union Pacific R. R. Co., 225 U. S. 582 20
Knights of Pythias vs. Meyer, 265 U. S. 30 10
Leavenworth etc. Ry. Co. vs. U. S., 92 U. S. 733, 748-749 21

Page

Missouri Valley Land Co. vs. Wiese, 208 U. S. 234 10
Missouri Valley Land Co. vs. Wrich, 208 U. S. 250 10
Mulvihill vs. S. P. Co., 16 Fed. (2nd.) 100, 104 25
Nadeau vs. Union Pacific R. R. Co., 253 U. S. 442 20
North Coast Railway vs. Northern Pacific Ry. Co., 48 Wash. 529, 94 Pac. 113 19
Northern Pacific R. Co. vs. Colburn, 164 U. S. 383 10
Nor. Pac. R. R. vs. Smith, 171 U. S. 261, 275 ....4, 22
Nor. Pac. Ry. vs. Townsend, 190 U. S. 267, 271..4, 22
Olcott vs. Board of Supervisors, 16 Wall. 678 23
Railroad Co. vs. Baldwin, 103 U. S. 426 28
Railway Co. vs. Alling, (Oct. Term 1878) 99 U. S. 463, 479 .....4, 15
Sinking Fund Cases, 99 U. S. 700, 719, 757....4, 14, 20
Southern Pacific Co. vs. Hyatt, 132 Cal. 240, 242, 244 23
Southern Pacific Co. vs. Schuyler, 227 U. S. 601, 611 10
Town of Red Bluff vs. Walbridge, 15 Cal. App. 770 26
Tucson Consolidated Copper Co. vs. Reese, (Ariz.) 100 Pac. 777, 778 28
Union Pacific R. R. Co. vs. Laramie Stock Yards, 231 U. S. 190, 200 18
Union Pacific R. R. Co. vs. Snow, 231 U. S. 204 18
United States vs. Denver & Rio Grande Railway, 150 U. S. 1, 10 .....4, 17, 20
Williams, Mayor, et al. vs. Atlantic Coast R. R. Co., 17 Fed. (2nd.) 17 .....4, 24

TABLE OF STATUTES AND COURT RULE.

	Page
Act of July 1, 1862 (12 Stat. 489) Sec. 12	2
Act June 8, 1872 (17 Stat. 399)	15
Act March 3, 1875 (18 Stat. 482)	3, 14
Act May 25, 1920 (41 Stat. 621)	6, 13
California Code Civil Procedure, Secs. 939, 940	3
California Constitution, Art. VI, Sec. 2	3
Cal. Stats. 1852, p. 150	10
Cal. Stat. April 26, 1858, Sec. 1	28
Cal. Stats. 1863-1864, p. 471	10
Cal. Supreme Court Rule XXX, Sec. 1	3
Interstate Commerce Act, Sec. 1 (Subdv. 18)	23
Judicial Code Sec. 237(b)	6
R. S. Sec. 2477	9
U. S. C. A. Title 28, Sec. 344(b)	6

TEXTBOOK.

Jones on Easements, Sec. 281, p. 232 ..... 4, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. ——

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the BOARD OF SUPERVISORS OF SAID COUNTY, John Doe Corporation, Richard Roe Corporation, John Smith, Thomas Brown, James Coe, Joseph Hoe, Edward Poe, Robert Crow and Frederick Stow, *Respondents and Respondents below.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.

SUMMARY STATEMENT OF MATTER INVOLVED.

That the Supreme Court of the State of California is the highest court of law and equity in said state; that the judgment of said court hereinafter mentioned is a final judgment, and presents a federal question reviewable by this court on certiorari, as hereinafter particularly pointed out.

This was a statutory proceeding to quiet title, brought by petitioners in the Superior Court of the State of California in and for the respondent county of Alameda. The case involved respondents' assertion of right to maintain certain county roads encroaching longitudinally upon the railroad right of way 400 feet in width granted to petitioners' predecessor, Central Pacific Railroad Company of California, by Act of Congress approved July 1, 1862. (12 Stat. 489.)

The county highway encroachments were described in the complaint in six several parcels, and the trial court adjudged the fee title vested in petitioner Central Pacific Railway Company as to all. (R. p. 54.) As to three parcels of highway the trial court awarded exclusive possession to petitioners, Central Pacific Railway Company as owner and Southern Pacific Company as lessee and operator of the railroad. (R. p. 61.)

The remaining three parcels of highway are portions of a public county road extending through a three-mile pass in the hills of Alameda County, known as Niles Canyon. (See Defendants' Exhibit D, being a portion of topographic sheet of the Pleasanton

Quadrangle United States Geological Survey, R. opp. p. 132.) As to these three parcels the trial court found Central Pacific Railway Company's title qualified by section 2 of the Act of Congress approved March 3, 1875 (18 Stat. 482) being the general act granting railroad rights of way through the public domain. (R. pp. 61-62.)

Petitioners appealed as of right (California Code of Civil Procedure, sections 939, 940) to the State Supreme Court from that part of the judgment holding the right-of-way title qualified by the Act of March 3, 1875. The Supreme Court of California on April 27, 1931, affirmed the judgment below. (R. p. 199.) Petition for rehearing was filed by the petitioners here, and denied. (R. p. 200.) The judgment of the Supreme Court became final May 27, 1931. (Constitution of California, Article VI, Section 2; California Supreme Court Rule XXX, Section 1.)

In affirming the judgment the Supreme Court of the State held (1) that this railroad right of way granted by special act of Congress is amenable to the police power of the state for longitudinal highway encroachments (R. p. 193 *et seq.*); (2) that the respondent County of Alameda had acquired a right of way easement by adverse user (R. p. 199 *et seq.*); (3) that the special right of way grant of July 1, 1862, was amended by the Act of March 3, 1875, authorizing joint occupancy of the right of way by the railroad and by the highway. (R. p. 199.)

II.

REASONS FOR ALLOWANCE OF WRIT.

(1). The ruling of the State Supreme Court that the police power extends to the taking of longitudinal strips of railroad right of way specially granted by Congress is inconsistent with numerous rulings of the Supreme Court of the United States, notably *Nor. Pac. R. R. v. Smith,* 171 U. S. 261, 275; *Northern Pacific Ry. vs. Townsend,* 190 U. S. 267.

(2). The ruling that longitudinal portions of the railroad right of way may be acquired by adverse user is contrary to the decisions of this court above mentioned and contrary to the general rule (Federal and State) that the continuous operation of a railroad on the right of way forestalls adverse rights in the general public. *Williams, Mayor, et al., vs. Atlantic Coast R. R. Co.,* 17 Fed. (2nd) 17; *H. A. & L. D. Holland Co. vs. Nor. Pac. Ry. Co.,* 214 Fed. 920, 926; *Jones on Easements,* Sec. 281, p. 232.

(3). The ruling of the state court that the right of way grant of July 1st, 1862, was, as to vested title, qualified and diminished by the Act of March 3, 1875, is inconsistent with the ruling of this court in the *Sinking Fund Cases,* 99 U. S. 700, 719, 757; *Railway Co. vs. Alling,* 99 U. S. 463, 479; *United States vs. Denver & Rio Grande Ry.,* 150 U. S. 1, 10.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Supreme Court of the State of California, commanding said state court to certify and send to

this court a full and complete transcript of the record and of the proceedings of the said State Supreme Court had in the case designated and entitled on its docket S. F. No. 13041, Central Pacific Railway Company *et al.*, Plaintiffs and Appellants, vs. County of Alameda, *et al.*, Defendants and Respondents, to the end that this cause may be reviewed and determined by this court, as provided by the statutes of the United States; and that the judgment therein of said State Supreme Court be reversed by this court, and for such further relief as to this court may seem proper.

Dated: July 10, 1931.

C. F. R. OGILBY,
FRANK THUNEN,
Attorneys for Petitioners.

GUY V. SHOUP,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion in the Supreme Court of the State of California (R. p. 187 *et seq.*) is reported in 81 Cal. Dec. page 652; 299 Pac. Rep. 75

II.

JURISDICTION.

(1). The date of the decision to be reviewed is April 27, 1931 (R. p. 187) which became final under the state constitution (Art. VI, Sec. 2) and the rule of the Supreme Court (Rule XXX, Sec. 1) on May 25, 1931. (R. p. 200.)

(2). The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code Section 237(b); U. S. C. A. Title 28, Section 344(b). This is a case where a railroad right of way title is specially claimed by petitioners under a federal statute (12 Stat. 489), and the court below has held that claim invalid in part by reason of the following: (a) an assumed retroactive amendment by a later federal statute (18 Stat. 482) a question not heretofore in specific terms decided by this court, though applicable decisions indicate a rule to the contrary; (b) exercise of police power infringing federal interest and against the rule of federal decision; (c) adverse user to the same effect.

(3). The facts showing that the nature of the case and the ruling below were such as to bring the case within the jurisdictional provisions relied upon are briefly these:

(*a*). The railroad right of way is claimed by petitioners directly under Congressional grant of July 1, 1862. (12 Stat. 489.) The State Supreme Court, affirming the judgment of the trial court, held (R. p. 189):

> "In 1862 Congress enacted the so-called Pacific Land Grant Act, whereby the Central Pacific Railroad Company was granted a right of way 400 feet wide over and across government lands in California to the Pacific coast, for the purpose of constructing along the center thereof a railroad and telegraph line to serve as a link in the first transcontinental railroad. Part of the route selected by said company was through the Niles canyon, which was then unappropriated public land."

And the Supreme Court has concluded with the trial court (R. p. 190):

> "The trial court's conclusions of law were that the Central Pacific Railway Company is the owner of the paramount title in fee to the land now occupied by said highway and lying within the boundaries of said 400-foot right of way, 'subject to an easement in favor of defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes * * * subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled

> "An act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482), declaring "and the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road.'"

(*b*). In addition to the foregoing assumed retroactive amendment of the Act of July 1st, 1862, by the Act of March 3, 1875, the State Supreme Court has found the grant of July 1st, 1862, further qualified by general law subjecting longitudinal portions of such rights of way to be taken for highway purposes by condemnation under the state police power. The opinion in this regard recites (R. p. 193):

> "Moreover, it has been consistently held that in cases of public necessity such rights of way are at all times amenable to the police power of the state and subject to the state's right of eminent domain, provided that in the exercise thereof the special purpose of the grant to the railroad is not thereby impaired."

Upon this same point the state court says further, citing certain other state cases (R. p. 195):

> "It is, therefore, held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the necessities of the two companies in the interest of the public service is sufficient to warrant it."

(*c*). The State Supreme Court has found a third limitation upon the right of way title, that the 400 foot width may be diminished by adverse user. Upon this point the opinion recites (R. p. 199):

> "But even assuming that the act of 1875 does not so apply, the county is nevertheless clearly entitled to a decree under the doctrine of adverse user, establishing its easement in those portions of the right of way now occupied by its highway, leaving for further determination the question of the superior need of those portions of the right of way, in case appellants should claim that the same were essential to the convenient operation of its railroad."

(*d*). Respondents' claim also rests upon a federal question. The Supreme Court holds (R. p. 188):

> "For approximately seventy years the county of Alameda has maintained a public highway through and along the bottom of the Niles canyon from Niles to Sunol. It was laid out and declared to be such by the county in 1859, and has since served as one of the main arteries of travel between the bay regions of southern Alameda county and the Livermore valley."

This statement is challenged by petitioners upon the federal issue that until July 26, 1866 (R. S. Sec. 2477) there was no authority from Congress by which the county could acquire a right of way over the public

domain. The railroad right of way title was then perfect.

(*e*). A further and incidental question is presented in that the legislature of the state of California on May 1, 1852, memorialized Congress for this transcontinental railroad as a measure of self-protection, and granted to the federal government a right of way therefor. (Cal. Stats. 1852, p. 150.) On April 4, 1864, the state legislature ratified the congressional railroad right of way grant of July 1st, 1862. (Cal. Stats. 1863-1864 p. 471.) These legislative enactments rise above any claim by the county and feed petitioners' claim under the federal statute. The recital last quoted is further challenged by petitioners upon the evidence, the findings of the trial court, and local law.

(*4*). The cases believed to sustain the jurisdiction of this court to review said cause on certiorari are as follows: *Jordan vs. Tashiro,* 278 U. S. 123; *Grayson vs. Harris,* 267 U. S. 352; *Knights of Pythias vs. Meyer,* 265 U. S. 30; *Dana vs. Dana,* 250 U. S. 220; *Erie R. R. Co. vs. Hamilton,* 248 U. S. 369; *Carlson vs. Curtis,* 234 U. S. 103; *Gauthier vs. Morrison,* 232 U. S. 452; *Southern Pacific Co. vs. Schuyler,* 227 U. S. 601, 611; *Missouri Valley Land Co. vs. Wiese,* 208 U. S. 234; *Same vs. Wrich,* Id. 250; *Green Bay etc. Canal Co. vs. Patten Paper Co.,* 172 U. S. 58; *Northern Pacific R. Co. vs. Colburn,* 164 U. S. 383.

III.

STATEMENT OF THE CASE.

The facts underlying the primary issues are stated in the petition and in the foregoing portions of this

brief. The history of the highway might be stated more fully. We have quoted the opinion that this highway was laid out and declared to be a county road in 1859. Further along in the opinion it is said (R. p. 191) "and part of the evidence supporting the finding shows that pursuant to a petition presented to the board in November, 1858, survey No. 247 was made by the board and filed in May, 1859; and that after due notice and hearing the board declared the road as surveyed and located to be a public highway and directed that it be opened forthwith."

The local law provided (Cal. Stats. April 26, 1858) that no road shall be considered a public highway unless declared such by order of the court of sessions or the board of supervisors. The line adopted by the board of supervisors in 1859 was surveyed and platted by the county surveyor of Alameda County, the plat dated April 11, 1859, being inserted in the record as Defendants' Exhibit B (R. opp. p. 98). It will be observed the adopted highway line throughout its entire distance is north of Alameda creek. But that line was never opened. Most of the travel was in the bed of the creek. (R. p. 113.) Crossings were several. (R. p. 120.) Defendants' Exhibit D (R. opp. p. 132) being a portion of topographic sheet of the Pleasanton Quadrangle, United States Geologic Survey, shows four crossings in a distance of about a mile in the canyon. The trial court found "that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with county road No. 4974, adopted by the Board of Supervisors of the defendant County of Alameda March 27, 1911, or whether the highway actually

traveled prior to 1911 followed the line of survey No. 247 for any distance whatever." (R. p. 50.) The Supreme Court says upon this point: "In 1910 or thereabouts, on account of the flood waters of the creek, the county was obliged to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way." (R. p. 189.)

IV.

SPECIFICATION OF ERRORS.

1. The court erred in holding that the Act of July 1, 1862, was retroactively amended and qualified by the Act of March 3rd, 1875, as to petitioners' vested title.

2. The court erred in holding that the police power of the state extends to the appropriation of longitudinal strips of land within the boundaries of the right of way 400 feet in width granted by the Act of July 1, 1862.

3. The court erred in holding that respondents had acquired the right by adverse user to maintain a county road paralleling and within the boundaries of the railroad right of way granted by the Act of July 1, 1862.

4. The court erred in holding that the respondent County of Alameda could acquire any highway right prior to the highway grant of July 26, 1866 (R. S.

Sec. 2477); or that it could acquire any license which was not defeated by the Act of Congress approved July 1, 1862.

5. The court erred in holding that the way traveled through Niles Canyon at or prior to the time of the railroad right of way grant was ever adopted by the board of supervisors of Alameda County as a public highway.

V.

SUMMARY OF THE ARGUMENT.

1. *The effect of the Act of Congress Approved March 3, 1875 (18 Stat. 482) as Amendatory of Special Grants theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It was not within the Intent or the Power of Congress to Impair Vested Title.*

2. *The State Police Power and the Power to Acquire Highway Rights by Adverse User Could not Extend beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920 (41 Stat. 621) the Railroad Company Had No Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant.*

3. *There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, nor until Four Years thereafter. The County of Alameda Did not Adopt the Traveled Way as a County Road. Any Claim of the County to the Traveled Way Was Renounced by the State in the Legislative Acts of May 1, 1852, and April 4, 1864.*

VI.

ARGUMENT.

1.

The Effect of the Act of Congress Approved March 3, 1875 (18 Stat. 482), as Amendatory of Special Grants Theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It was Not Within the Intent or the Power of Congress to Impair Vested Title.

We have said under this point that this court has not heretofore in specific terms decided the question whether the Act of March 3rd, 1875, constituted a retroactive amendment of previous special grants in cases where the title was vested prior to March 3rd, 1875. There are cases from this court, however, which seem to compel a ruling that the Act of March 3rd, 1875, cannot be construed as an amendment of the Act of July 1, 1862, so as to diminish the right of way here in question. Certainly there is nothing in the act of 1875 purporting to modify or prejudice any prior grant; nor is it conceivable that congress could have qualified the grant of July 1st, 1862, as to vested right of way had congress so desired. The *Sinking Fund Cases*, 99 U. S. 700, 719, 757, are among the first to decide this principle. We find in the language of Mr. Chief Justice Waite, at page 719 of that opinion a very persuasive statement in line with our contention:

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as

it would be if the repudiator had been a state or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

There were dissenting views on certain points, but apparently there was no dissent upon the integrity of the vested title. The foregoing quotation occurs in the main opinion, and the bench seems to have been entirely agreed upon the proposition that the grant vested title indefeasible except upon breach of the implied condition that the grant would be exercised for the purpose intended. Mr. Justice Field says upon the same point at page 757, that so far as the title is concerned, the contract between the government and the railroad company was an executed and closed transaction, and that the title was as much beyond the reach of the government as any other property vested in private proprietorship.

Cases are limited where the specific issue of title was presented; we have found none where the question involved right of way vested prior to March 3rd, 1875. There is a case where the special right of way grant preceded the Act of March 3rd, 1875, but the title was not claimed, and the grant was subject to forfeiture, on March 3rd, 1875. *Railway Company vs. Alling* (Oct. Term 1878) 99 U. S. 463, 479. That case had to do with the following facts:

Congress on June 8, 1872 (17 Stat. 399) granted to Denver and Rio Grande Railway Company a right of way, conditioned that the grantee should complete its road to a point on the Rio Grande as far south as Santa Fe within five years, and complete each

year thereafter fifty miles additional south of that point. The road was not completed to Santa Fe within the allotted period, and on March 3, 1877, Congress amended the grant of June 8, 1872, extending the period to ten years from the original act to complete the road as far south as Santa Fe. In the meantime, and after the approval of the Act of March 3, 1875, Cañon City and San Juan Railway Company asserted its claim under the latter act to occupy the Grand Cañon of the Arkansas. Mr. Justice Harlan, expressing the opinion of the court, said at page 479:

> "Our next inquiry is as to the extent to which the rights of the Denver Company were affected or modified by the act of March 3, 1875. When that act was passed, its grant of the right of way by the act of June 8, 1872, had not been acted upon as to the Grand Cañon of the Arkansas. There had not been, on March 3, 1875, an actual location of its line through that defile, nor any occupancy thereof, in good faith, for the purpose of constructing its road. The five years originally given to that company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fe, expired on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original act. Now, it is solely by reason of such extension that the Denver Company had the right, on the 19th of April, 1878, to take possession of the Grand Cañon, and prepare for the final location and construction of its road through that pass. When, therefore, it accepted the benefits of the Act of March 3, 1877, it must be held to have assented to the provisions of the Act of March

> 3, 1875, whereby it was declared in the interest of the public, that any other railroad company duly organized under the laws of any State or Territory might use and occupy the cañon, for the purpose of its road, in common with the road first located."

The reasoning of the court necessarily accepts the hypothesis that the Denver Company by reason of its default had no rights whatsoever in the Grand Cañon of the Arkansas on March 3, 1875. Congress could and did waive the forfeiture and imposed upon the grant the further restrictions of the Act of March 3, 1875.

Our construction of this decision is reinforced by the opinion in *United States vs. Denver & Rio Grande Railway*, 150 U. S. 1, 10. In that case the government challenged the right of Denver & Rio Grande Railway Company to avail itself of the incidental benefits of the Act of March 3, 1875, because the company having accepted the special grant of June 8, 1872, subsisting at the time of the passage of the Act of March 3, 1875, could not rightfully claim the benefits of the latter act. The court said, at page 10:

> "In that case the Denver Company (the defendant in error here) had in 1871 and 1872 merely made a preliminary survey of its line through the Grand Cañon of the Arkansas, but had postponed the actual location and final appropriation of its roadway through that defile until April, 1878, at which date it was subject to the provisions of the Act of 1875 (the second section of which conferred upon other roads the right, upon certain terms and conditions, to use its track or roadway through such defiles), for

> the reason that after the passage of that act the Denver Company had accepted the benefit of the Act of March 3, 1877, extending the time for the completion of its road to Santa Fe, which extension the court assumed would hardly have been given by Congress except subject to the conditions contained in the Act of 1875. Being subject to the provisions of the law, as contained in the second section of the act of 1875, while in the exercise of its rights under the act of 1872, as amended by the act of 1877, in no way prevented the railway company from complying with its conditions and securing the benefits conferred by the first section of the act of 1875."

Otherwise expressed, the right of way grant to the Denver Company was in a sense executory on March 3, 1875, by reason of condition broken. The grantee was bound to accept its new privileges subject to existing law. But such is not the case before this court. Here there was no breach of condition, no failure to perform on the part of the railway company. The road was constructed long prior to the Act of March 3rd, 1875.

The opinion below purports to find support for retrospective amendatory operation of the Act of March 3rd, 1875, in the wholly irrelevant act of congress approved June 24, 1912, ratifying certain right of way deeds executed by the Union Pacific Railroad Company. The opinion cites *Union Pacific R. R. Co. vs. Laramie Stock Yards,* 231 U. S. 190, 200, and *Union Pacific R. R. Co. vs. Snow,* Id. 204, and the opinion erroneously declares the effect of these decisions as follows:

"On the contrary it appears therefrom that in 1912 Congress did enact legislation which had the direct effect of depriving the Union Pacific R. R. Co. of certain unused portions of the rights of way previously granted to it under this very act of 1862, and the right of Congress so to do was not challenged." (R. p. 197.)

Contrary to the opinion of the state court, the Supreme Court of the United States distinctly held that to give the Act of June 24, 1912, a retroactive effect "may incur the opposition of the Constitution." (231 U. S. 200.)

The Act of June 24, 1912, is not only irrelevant to the grant to Central Pacific Railroad Company of California but irrelevant also to the purpose and effect of section 2 of the Act of March 3rd, 1875.

2.

The State Police Power and the Power to Acquire Highway Rights by Adverse User Could Not Extend Beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920 (41 Stat. 621), the Railroad Company Had No Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant.

This point of contention bears upon the second and third specifications of error. The state court rests its opinion on the issue of police power in part upon several federal decisions involving right of way *crossings.* (R. p. 194.) For the authority to take by eminent domain extended *longitudinal* strips the opinion rests wholly upon a state case, *North Coast Railway vs. Northern Pacific Railway Company,* 48

Wash. 529, 94 Pac. 113 (R. p. 194) but the North Coast-Northern Pacific case does not purport to establish a rule governing right of way titles fully vested under special federal grant prior to the Act of March 3rd, 1875. The ruling is not out of harmony with what we have quoted from the *Sinking Fund Cases* and from *Railway vs. Alling* and *United States vs. Denver & Rio Grande Railway*. The Northern Pacific Railroad Company claimed under the special right of way grant of July 2nd, 1864, but the right of way involved in that case was in a narrow defile, known as "Union Gap," owned by certain Indians, and was expressly regarded by the Supreme Court of Washington as not subject to the right of way grant until ceded by the Indians in 1885. The Supreme Court of Washington has to say upon this point (94 Pac. 113):

> "That portion of the right of way here in question lies within said reservation, and was not a part of the public lands within the meaning of the said act of Congress, which the United States could then absolutely grant. The reservation thereof to the Indians, therefore, remained in force until the year 1885."

This decision was long before the rule established by this court in *Nadeau vs. Union Pacific R. R. Co.*, 253 U. S. 442 and *Kindred vs. Union Pacific R. R. Co.*, 225 U. S. 582, to the effect that the right of way granted by the Act of 1862 was effective in Indian reservations. Whether the reasoning of the Supreme Court of Washington was sound or not under the circumstances of that case, it is clear that the court rested its decision upon the assumption that the

right of way did not take effect in Union Gap until the year 1885. If the special grant of July 2nd, 1864, did not take effect *in praesenti*, it did not take effect at all (*Leavenworth etc. Ry. Co. vs. U. S.*, 92 U. S. 733, 748-749), and the Northern Pacific Railway Company had to look to subsequent federal authority for its right of way through Union Gap. The court may well have assumed, as did this court in the Alling case, *supra*, that any federal authority granted subsequent to the Act of March 3rd, 1875, was conferred in view of that grant and subject to its limitations.

The late Judge Rudkin of the Ninth Federal Circuit was a member of the Supreme Bench of Washington when the North Coast-Northern Pacific case was decided. It was he who rendered the decision in the eastern district of Washington in the case of *Holland Co. vs. Nor. Pac. R. R. Co.*, 208 Fed. 598, 603. That case denies the power of the railway company to alienate a longitudinal strip of its congressional right of way for highway purposes. The opinion declares, page 603, that the power of the railroad company to dispose of any part of its right of way of its own volition is measured by what it may be compelled to do under the police power of the state. Conversely, the police power of the state cannot extend beyond the power of the railroad company to give its voluntary consent, because both propositions are limited in the same degree by the same federal restriction. Nowhere in the federal statutes prior to May 25, 1920 (41 Stat. 621) can be found any authority for the alienation for highway purposes of any portion of a railroad right of way granted by special act of Congress.

On appeal of the Holland case to the Circuit Court of Appeals for the Ninth Circuit (214 Fed. 920) the appellate tribunal considered the authorities upholding ways laid out *across* the right of way, and held at page 926:

> "But in no substantial sense do these considerations apply to the case of a street or other highway laid out along, instead of across, the right of way. Granting the need of a road running parallel or in the same general direction with the railroad, there is no necessity for imposing the burden thereof upon the right of way. It is hardly probable that the practice of so locating a highway was common at the time the act was passed, and, upon the whole, it is unreasonable to suppose that Congress anticipated that such a use would ever be made of the right of way. It imposes a much greater burden than a mere crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use."

Limitation upon the company's power of alienation is clearly set forth in *Northern Pacific Railroad vs. Smith*, 171 U. S. 261, quoted in *Northern Pacific Ry. Co. vs. Townsend*, 190 U. S. 267, 271:

> "Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 261, 275; (18 S. Ct. 794, 799; 43 L. Ed. 157) speaking of the very grant under consideration: 'By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was

necessary for a public work of such importance.' Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

This judicial declaration does not necessarily conclude the inquiry as to concessions which might be made for public purposes. On the other hand it does not even suggest power of alienation or liability to loss by adverse user for public purposes not in furtherance of railroad operation. Under the *Interstate Commerce Act*, section 1, (Subdv. 18), a common carrier may not alienate or abandon any part of its property for any purpose without first having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity will not be prejudiced.

The Supreme Court of California has long recognized the principle clearly expressed by the Supreme Court of the United States that a railroad right of way is itself a public highway of a special and restricted nature In *Southern Pacific Company vs. Hyatt*, 132 Cal. 240, 242, 244, the state court quotes from *Olcott vs. Board of Supervisors*, 16 Wall. 678, saying:

"That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence."

> * * * "It is said that railroads are not public highway *per se*; that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such."

The same case quotes with approval (page 244) the general rule declared in Jones on Easements:

> "Jones on Easements lays down the rule that the prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public, or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track constantly in use is a definite badge of ownership and the only practical assertion of title that can be made. If the public has used paths by the side of the railroad track for any length of time, the use must be considered as permissive, and not adverse. (Citing a long list of authorities from different states; Jones on Easements, sec. 281, p. 232.)"

The federal view point is given in *Williams, Mayor, et al. vs. Atlantic Coast Line R. Co.*, 17 Fed. (2nd.) 17, 21, that the law does not require a railroad in order to preserve its right of way, to act the dog in manger and churlishly refuse to allow the public to use a portion of its right of way for a street or road where such portion is not then needed. The court in that case enjoined the town of Mullins, South Carolina, from laying hard surface paving on portions of a street within the railroad right of way, notwith-

standing the fact that there was in that case no legal restriction on the company to convey or dedicate, and the city had used the street for half a century. (Page 21.) The court approved the rule, page 20, that no right could be acquired by the town by prescription, and on page 21, that there was no element either of estoppel or abandonment presented by the circumstances.

The views of the Circuit Court of Appeals for the Ninth Circuit in the Holland case, *supra,* are again approved in *Barnes vs. Southern Pacific Company,* 16 Fed. (2nd.) 100, 104, and *Mulvihill vs. Southern Pacific Company,* 16 Fed. (2nd.) 100, 104:

> "Congress has not authorized the disposition of unused portions of the right of way. The power of the railroad company to alienate, as well as the power of others to acquire, any part thereof, is measured, not by what can be spared from railroad uses, but by what is required to meet such needs of the public or of individuals as fall within the scope of the principle already discussed. Privileges conferred by revocable licenses are, of course, excluded. In such cases the railroad company never loses its right to possession and control."

We quote also from the Court of Civil Appeals of the State of Texas:

> "To hold that the mere use by the public, without objection, of a portion of a railway right of way, and continued during the statutory period of limitation, or for twenty years, would cause the railway company to lose the use of its property which it may need for legitimate purposes connected with its operation, would cause unutter-

able confusion and bring about in this state a condition of affairs which would seriously interfere with railway traffic. A railroad is itself a public highway, constructed and operated for the public benefit, and some courts have gone so far as to hold that a right by prescription, or limitation, cannot be acquired against a railroad to any portion of its right of way. Southern P. Ry. Co. v. Hyatt, 54 L. R. A., 522; Northern P. Ry. Co. v. Smith, 171 U. S., 260; Jones on Easements, sec. 281, and authorities cited in note. There are many portions of railway tracks and rights of way, especially around and near depots in cities and large towns, where the public use the right of way for passing to and fro continuously, and where such use has been kept up in some cases far beyond the period of time necessary to create an absolute easement—yet no court in this state has ever treated such persons, when injured while using the railway right of way, as more than licensees."

Heilbron vs. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613).

3.

There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, Nor Until Four Years Thereafter. The County of Alameda Did Not Adopt the Traveled Way as a County Road. Any Claim of the County to the Traveled Way Was Renounced by the State in the Legislative Acts of May 1, 1852, and April 4, 1864.

The opinion below recognizes the lack of congressional authority for the county highway through Niles Canyon. The court quotes from *Town of Red Bluff vs. Walbridge,* 15 Cal. App. 770, and says (R. pp. 191-192):

> "As against the federal government it (the county here) could not perhaps make a public highway over its lands without its consent or acquiescence, but the federal government is not complaining and its policy has always been to encourage the building of highways over the public domain, thereby facilitating its settlement and use, and this policy was crystallized into a statute passed on the 26th day of July, 1866."

The court below refers to the Niles Canyon highway as a way of necessity. (R. p. 190.) The doctrine of ways of necessity is foreign to the facts, there being no privity or other relation whatsoever between the railroad company and the county. Nor is it a fact that the topography of Niles Canyon offers any serious obstacle to modern highway construction. We may look to the opinion itself for the statement that in 1910 or thereabouts the county found it practical "to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way". (R. p. 189.) This court may judicially know, what is matter of common knowledge, that highway engineers today are not balked by mountains or canyons, and are governed as much by scenery as by facility of construction.

The record is conclusive that the line adopted by the board of supervisors of Alameda County in 1859 i north of Alameda Creek throughout its entire distance through the canyon. It is equally conclusive that the way traveled was on both sides of the creek and in considerable part in the bed of the creek. Naturally those seeking passage through the canyon, where no

improved way existed, followed the route of easiest travel. Under the statute that did not constitute the way a public road. The California Statute of April 26, 1858, provides in section 1 that:

> "All roads in the counties of Tuolumne and Alameda shall be considered as public highways, which are now used as such, and have been declared such by order of the court of sessions or board of supervisors, or which may be declared such hereafter, by the board of supervisors within their respective counties; *provided*, that nothing in this act shall apply to any incorporated city or town within the counties named."

The route adopted by the board of supervisors was never opened, and the way used was never adopted.

> "Public highways are such only as come within the express provisions of the statute declaring them to be such, and that roads established without authority of law, for the convenience of individuals, are without any legal status either as public highways or as private ways."
>
> *Tucson Consolidated Copper Co, vs. Reese* (Ariz.), 100 Pac. 777, 778.

It may be conceded that the highway act of July 26, 1866, would take immediate effect upon approval as to highways previously laid out, *if the lands traversed were unappropriated public lands on the date of the act;* but that is not our case. Title to the lands here in question had passed out of the government and into Central Pacific Railroad Company of California instanter upon the approval of the right of way grant of July 1st, 1862. *Railroad Co. vs. Baldwin,* 103 U. S. 426.

The County of Alameda is only a political subdivision of the state; its claims cannot rise above the sovereign right. We have quoted the State's memorial of May 1, 1852, to Congress petitioning for this very transcontinental railroad as a matter of self-interest and granting to the federal government a right of way to that end. We have also cited the Act of April 4, 1864, whereby the state ratified and approved the grant made to petitioners' predecessor on July 1, 1862.

By the terms of the right of way grant the government retains a vital interest in maintaining its integrity. Section 12 of the grant provides in part that "the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, as one connected, continuous line". The federal government is directly interested in the question whether the county may as a matter of right appropriate to its own exclusive use essential portions of the right of way.

CONCLUSION.

It is therefore respectfully submitted that the merits of this case rest essentially upon federal questions calling for the exercise by this court of its supervisory powers, and that a writ of certiorari

should issue to the end that this court may review and reverse the decision of the court below.

Dated July 10, 1931.

C. F. R. OGILBY,
1422 F Street, N. W.,
Washington, D. C.
FRANK THUNEN,
65 Market Street,
San Francisco, Calif.
Attorneys for Petitioners.

GUY V. SHOUP,
65 Market Street,
San Francisco, Calif.
Of Counsel.

In the Supreme Court

OF THE

United States

NOV 24

OCTOBER TERM, 1931

No. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,

Petitioners,

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW, and FREDERICK STOW.

Petitioners' Brief on the Merits on Certiorari to the Supreme Court of the State of California.

C. F. R. OGILBY,
1422 F Street, N. W.,
Washington, D. C.

FRANK THUNEN,
65 Market Street,
San Francisco, Calif.

Attorneys for Petitioners.

GUY V. SHOUP,
65 Market Street,
San Francisco, Calif.

Of Counsel.

Parker Printing Company, 545 Sansome Street, San Francisco

Index

	Pages
REPORT OF THE OPINION BELOW, 299 Pac. Rep. 75; 81 Cal. Dec. 652	2
GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED	2
STATEMENT OF THE CASE	4
The Issue, Its Technical Nature and Practical Effect	4
The Facts	5
SPECIFICATION OF ERRORS ASSIGNED	9
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
I. Petitioners' Right of Way Title Vested under Congressional Grant on July 1st, 1862. The State through Its Legislature Disclaimed All Interest in that Strip of Land by Acts Approved May 1, 1852 and April 4, 1864. Alameda County, a Political Subdivision of the State, Cannot Be Heard in Repudiation	11
Authorities:	
City of Reno v. S. P. Co., 268 Fed. 751, 759	14
Railroad Co. v. Baldwin, 103 U. S. 426	15
United States v. Union Pacific R. R. Co., 91 U. S. 72, 79	11
Act of July 1, 1862 (12 Stat. 489)	14
Cal. Stats. 1852, p. 150	13
Cal. Stats. 1863-1864, p. 471	13
II. The Effect of the Act of Congress Approved March 3, 1875 (18 Stat. 482) as Amendatory of Special Grants theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners'	

Pages

Contention. It Was Not Within the Intent or the Power of Congress to Impair Vested Title 15

Authorities:

North Coast Ry. v. Northern Pacific Ry. Co., 48 Wash. 529 (94 Pac. 113) 17

Railway Co. v. Alling, (October Term 1878) 99 U. S. 463, 479 ..... 17, 23

Sinking Fund Cases, 99 U. S. 700, 719 ..... 21, 23

U. S. v. Denver & Rio Grande Ry., 150 U. S. 1, 10 ..... 19, 23

Union Pac. R. R. Co. v. Laramie Stock Yards, 231 U. S. 190, 200 21

Union Pacific R. R. Co. v. Snow, Id. 204 21

Act of July 1, 1862 (12 Stat. 489) 23

Act of June 8, 1872 (17 Stat. 399) 17

Act of Mar. 3, 1875 (18 Stat. 482) 17, 19, 20, 21, 22, 23

Act of Mar. 3, 1877 (19 Stat. 405) 18

Act of June 24, 1912 (37 Stat. 138) 21, 22

Act of May 25, 1920 (41 Stat. 621) 23

III. The State Police Power and the Power to Acquire Highway Rights by Adverse User Could Not Extend Beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920 (41 Stat. 621), the Railroad Company Had No Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant 24

Authorities:

Barnes v. S. P. Co., 16 Fed. (2nd) 100, 104 30

Heilbron v. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613) 31

Holland Co. v. Nor. Pac. R. R. Co., 208 Fed. 598, 603 ..... 26, 30

Holland Co. v. Nor. Pac. R. R. Co., 214 Fed. 920, 926 26

Pages

Kindred v. Union Pacific R. R. Co., 225 U. S. 582 25
Leavenworth etc. Ry. Co. v. U. S., 92 U. S. 733, 748-749 25
Mulvihill v. S. P. Co., 16 Fed. (2nd) 100, 104 30
Nadeau v. Union Pacific R. R. Co., 253 U. S. 442 25
North Coast Ry. v. Nor. Pac. Ry. Co., 48 Wash. 529, 94 Pac. 113 ..... 24, 26
Nor. Pac. R. R. v. Smith, 171 U. S. 261, 275 28
Olcott v. Board of Supervisors, 16 Wall. 678 29
Railway Co. v. Alling, (Oct. Term 1878) 99 U. S. 463, 479 ..... 24, 26
Sinking Fund Cases, 99 U. S. 700, 719, 757 24
S. P. Co. v. Hyatt, 132 Cal. 240, 242, 244 29
United States v. Denver & Rio Grande Ry., 150 U. S. 1, 10 24
Williams, Mayor, et al., v. Atlantic Coast R. R. Co., 17 Fed. (2nd) 17 30

Act of July 1, 1862 (12 Stat. 489) 25
Act of July 2, 1864 (13 Stat. 365) 25
Act of March 3, 1875 (18 Stat. 482) 24, 26
Act of May 25, 1920 (41 Stat. 621) 26
Interstate Commerce Act, Sec. 1 (Subdv. 18) 28
Jones on Easements, sec. 281, p. 232 29

IV. There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, Nor until Four Years Thereafter. In the meantime the 400 Foot Strip Was Granted by Congress and Dedicated to the Public Service of a Railroad Right of Way. The Way Used Prior to July 1, 1862, Was Never Adopted by the County of Alameda 32

Authorities:

Felsenthal v. Warring, 40 Cal. App. 119, 125 38
Town of Red Bluff v. Walbridge, 15 Cal. App. 770 33

Pages

Tucson Consolidated Copper Co. v. Reese (Ariz.), 100 Pac. 777, 778 37
United States v. Rindge et al., 208 Fed. Rep. 611, 619 34
Act of July 1, 1862 (12 Stat. 489) 32
Act of July 26, 1866 (U. S. Rev. Stat.) Sec. 2477 32
Cal. Stat., April 26, 1858, Sec. 1, p. 297 36
U. S. C. A. Title 43, Sec. 932 33
R. S., Sec. 2477 33

Table of Cases Cited

	Pages
Barnes v. Southern Pacific Company, 16 Fed. (2nd) 100, 104	30
Carlson v. Curtis, 234 U. S. 103	3
City of Reno v. S. P. Co., 268 Fed. 751, 759	14
Dana v. Dana, 250 U. S. 220	3
Erie R. R. Co. v. Hamilton, 248 U. S. 369	3
Felsenthal v. Warring, 40 Cal. App. 119, 125	38
Gauthier v. Morrison, 232 U. S. 452	3
Grayson v. Harris, 267 U. S. 352	3
Green Bay etc. Canal Co. v. Patten Paper Co., 172 U. S. 58	3
Heilbron v. St. Louis S. W. Ry. Co. of Texas, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613)	31
Holland Co. v. Nor. Pac. R. R. Co., 208 Fed. 598, 603	26, 30
Holland Co. v. Nor. Pac. R. R. Co., 214 Fed. 920, 926	4, 26
Jordan v Tashiro, 278 U. S. 123	3
Kindred v. Union Pacific R. R. Co., 225 U. S. 582	25
Knights of Pythias v. Meyer, 265 U. S. 30	3
Leavenworth etc. Ry. Co. v. U. S., 92 U. S. 733, 748-749	25
Missouri Valley Land Co. v. Wiese, 208 U. S. 234	3
Missouri Valley Land Co. v. Wrich, 208 U. S. 250	3
Mulvihill v. S. P. Co., 16 Fed. (2nd) 100, 104	30
Nadeau v. Union Pacific R. R. Co., 253 U. S. 442	25
Nor. Pac. R. R. Co. v. Colburn, 164 U. S. 383	3
North Coast Ry. v. Nor. Pac. Ry. Co., 48 Wash. 529, 94 Pac. 113	17, 24, 26
Nor. Pac. R. R. v. Smith, 171 U. S. 261, 275	4, 28
Nor. Pac. Ry. v. Townsend, 190 U. S. 267	4
Olcott v. Board of Supervisors, 16 Wall. 678	29
Railway Co. v. Alling, (Oct. Term 1878) 99 U. S. 463, 479	4, 17, 23, 24, 26
Railroad Co. v. Baldwin, 103 U. S. 426	15

Pages

Sinking Fund Cases, 99 U. S. 700, 719, 757 ..... 4, 21, 23, 24
S. P. Co. v. Hyatt, 132 Cal. 240, 242, 244 29
Southern Pacific Co. v. Schuyler, 227 U. S. 601, 611 3

Town of Red Bluff v. Walbridge, 15 Cal. App. 770 33
Tucson Consolidated Copper Co. v. Reese, (Ariz.) 100 Pac. 777, 778 37

Union Pac. R. R. Co. v. Laramie Stock Yards, 231 U. S. 190, 200 21
Union Pacific R. R. Co. v. Snow, 231 U. S. 204 21
United States v. Denver & Rio Grande Ry., 150 U. S. 1, 10 ..... 4, 19, 23, 24
United States v. Rindge et al., 208 Fed. Rep. 611, 619 34
United States v. Union Pacific R. R. Co., 91 U. S. 72, 79 ..... 5, 11

Williams, Mayor et al., v. Atlantic Coast R. R. Co., 17 Fed. (2nd) 17 ..... 4, 30

Table of Statutes and Court Rule.

Act of July 1, 1862 (12 Stat. 489) 2, 14, 23, 25, 32
Act of July 2, 1864 (13 Stat. 365) 25
Act of July 26, 1866 (U. S. Rev. Stat.) Sec. 2477 32
Act of June 8, 1872 (17 Stat. 399) 17
Act of March 3, 1875 (18 Stat. 482) 3, 17, 19, 20, 21, 22, 23, 24, 26
Act of March 3, 1877 (19 Stat. 405) 18
Act of June 24, 1912 (37 Stat. 138) 21, 22
Act of May 25, 1920 (41 Stat. 621) 23, 26
Cal. Stat. May 1, 1852 (p. 150) 13
Cal. Stat. April 26, 1858, Sec. 1 36
Cal. Stats. 1863-1864, p. 471 13
Cal. Supreme Court Rule XII 2
Interstate Commerce Act, Sec. 1 (Subdv. 18) 28
Judicial Code, Sec. 237(b) 3
U. S. C. A. Title 28, Sec. 344(b) 3
U. S. C. A. Title 43, Sec. 932 33
R. S. Sec. 2477 33

Textbook.

Jones on Easements, Sec. 281, p. 232 ..... 4, 29

(36,072)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation,

Petitioners,

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW, and FREDERICK STOW.

Petitioners' Brief on the Merits on Certiorari to the Supreme Court of the State of California.

REPORT OF THE OPINION BELOW.

The opinion in the Supreme Court of the State of California (R. p. 117 et seq.) is reported in 299 Pac. Rep. 75; 81 Cal. Dec. 652; not yet reported in California Reports.

There were three other opinions filed in the Supreme Court of the State of California, written by three several justices of the District Court of Apepal for the Third Appellate District, but only one of these, adopted by the Supreme Court, with slight modifications, appears in the record, the other two apparently not being regarded by the Supreme Court as part of the record herein. (R. p. 116, fol. 185; p. 119, fol. 188.)

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The purpose of paragraph one of Rule 12 of this court is accomplished in the petition herein and the brief in support thereof. The action, under state statute, involves title and right of possession to a railroad right of way claimed by petitioners under the special federal grant of July 1st, 1862 (12 Stat. 489), entitled "*An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes*". The court below, recognizing that title, has, nevertheless, contrary to applicable decisions from this

court, held (a) petitioners' rights qualified and impaired by the general right of way grant made by federal statute, approved March 3rd, 1875 (18 Stat. 482) (R. p. 131, fol. 197). (b) The state tribunal has also held this right of way granted by special act of Congress subject to the police power for highways encroaching longitudinally over long distances. This, also, is contrary to applicable decisions of this court (R. p. 126, fol. 193; p. 128, fol. 195). (c) the court below has also held this right of way subject to highway rights by adverse user, likewise contrary to applicable decisions from this court (R. p. 134, fol. 199).

The case is therefore reviewable under section 237(b) of the Judicial Code; U. S. C. A. Title 28, Section 344(b); *Jordan v. Tashiro,* 278 U. S. 123; *Grayson v. Harris,* 267 U. S. 352; *Knights of Pythias v. Meyer,* 265 U. S. 30; *Dana v. Dana,* 250 U. S. 220; *Erie R. R. Co. v. Hamilton,* 248 U. S. 369; *Carlson v. Curtis,* 234 U. S. 103; *Gauthier v. Morrison,* 232 U. S. 452; *Southern Pacific Co. v. Schuyler,* 227 U. S. 601, 611; *Missouri Valley Land Co. v. Wiese,* 208 U. S. 234; *Same v. Wrich,* Id. 250; *Green Bay etc. Canal Co. v. Patten Paper Co.,* 172 U. S. 58; *Northern Pacific R. Co. v. Colburn,* 164 U. S. 383.

This court has already considered these preliminary matters on petition for the writ. We cite again pertinent cases from this court and from the lower federal courts with which the state court's opinion is inconsistent, and which we think fully sustain petitioners'

position on all three grounds urged (*Nor. Pac. R. R. v. Smith*, 171 U. S. 261, 275; *Northern Pacific Ry. v. Townsend*, 190 U. S. 267; *Williams, Mayor, et al. v. Atlantic Coast R. R. Co.*, 17 Fed. (2d) 17; *H. A. & L. D. Holland Co. v. Nor. Pac. Ry. Co.*, 214 Fed. 920, 926; *Jones on Easements*, Sec. 281, p. 232; *Sinking Fund Cases*, 99 U. S. 700, 719, 757; *Railway Co. v. Alling*, 99 U. S. 463, 479; *United States v. Denver & Rio Grande Ry.*, 150 U. S. 1, 10).

STATEMENT OF THE CASE.

(1) *The Issue, Its Technical Nature and Practical Effect.*

(2) *The Facts.*

---

(1) THE ISSUE, ITS TECHNICAL NATURE AND PRACTICAL EFFECT.

The issue is simply one of title and right of possession; whether the railroad company or the county has the superior right and control within the conceded boundaries of the railroad right of way. The practical effect of the issue, as decided below, is to subordinate the railroad company to the will or the whim of the county whenever the railroad company may find it necessary or expedient to improve or revise its alignment or extend its facilities within the boundaries of the right of way. The highway in places approaches within a few feet of the ends of the ties (see Exhibit R. p. 40A, fol. 70a).

(2) THE FACTS.

The facts supporting petitioners' contentions are found substantially in their entirety by the trial court, whose judgment was affirmed by the State Supreme Court. The transcontinental right of way, of which this is part, was an economic and defensive national necessity (*U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72, 79). The present location of the track was proven to be coincident with the center line of right of way as originally located and the trial court has found (R. p. 23, fol. 38):

> "That plaintiff Central Pacific Railway Company is the owner in fee of a strip of land 400 feet in width, lying equally 200 feet on each side of the center line of main track of railroad in the County of Alameda and embracing within the outer boundaries of the said railroad right of way the following particularly described strips of land."

Then follows the description of six parcels of land designated as A, B, C, D, E, and F, embracing all highway areas described in the complaint. The findings then continue (R. p. 26, fol. 45):

> "That the aforementioned railroad right of way, embracing the foregoing particularly described parcels of land is a part of the right of way granted to Central Pacific Railroad Company of California by Act of Congress approved July 1, 1862, entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to

the Government the use of the same for postal, military and other purposes.' (12 Stat. 489.) That plaintiff Central Pacific Railway Company is successor in title to Central Pacific Railroad Company of California by successive corporate consolidations and by mesne conveyance."

It is next found as a fact (R. p. 27, fol. 46) that the entire area was on July 1, 1862, unappropriated public land of the United States; that the railroad was fully constructed as required by the act and accepted by the President of the United States on behalf of the government.

Two of the parcels of highway, identified in the judgment as parcel A and parcel B lie in flat open country, and the judgment awarded petitioners possession of those parcels. Parcel C is an unimportant branch at the westerly end of the canyon hereinafter mentioned, and the trial court also awarded petitioners possession of that parcel. Parcels D, E and F constitute part of the existing highway through a pass in the hills of the respondent Alameda County, known as Niles Canyon. Parcels D, E and F have their terminals on the right of way boundaries and are connected by other portions of the highway lying outside of the right of way boundaries. This is illustrated by plaintiffs' Exhibit No. 6 (inserted R. p. 40A, fol. 70a).

The topographic conditions at the foundation of the conclusion adverse to petitioners are illustrated by Defendants' Exhibit D (inserted R. p. 84A, fol.

132a). This is a portion of topographic sheet of the Pleasanton Quadrangle, United States Geological Survey. The pass is there identified as Alameda Canyon.

Prior to the right of way grant the County of Alameda caused a survey to be made for a highway route through this pass. A survey was made by the County Surveyor with that degree of precision in vogue at the time, and a plat of his survey was approved and adopted by the Board of Supervisors. The route lay throughout its entire distance through the pass on the northerly side of Alameda Creek (Defendants' Exhibit B, inserted R. p. 60A, fol. 98a). There are several crossings in the present highway. The highway route thus adopted in 1859 was known as Road Survey No. 247. There was no evidence of construction on that line of route. On the contrary there was no highway construction through the pass entirely on the north side of the creek. The Geologic Survey (Defendants' Exhibit D, R. p. 84A, fol. 132a), was made in 1904. It shows four crossings of the creek in a little more than a mile of highway. One crossing is shown by Plaintiffs' Exhibit No. 6 (R. p. 40A, fol. 70a) in approximately the location shown on the topographic sheet, a short distance east of Farwell. In other respects no existing crossings are shown in the locations exhibited on the topographic sheet.

There is some testimony of old residents of the region, whose recollections, however, do not extend

back of the railroad grant. Their testimony, taken for what it is worth, indicates that it was possible in the early sixties to traverse the canyon, at least when the water was low, when the creek bed itself served in large part as a passage way.

Israel Richards penetrated the canyon part way, but not entirely, the latter part of 1863 or early in 1864 (R. p. 70, fol. 112). They used to ride through on horseback sometimes and hunt up that road, traveling in the creek bed mostly at certain points (Id. fol. 113).

G. W. Buttner first made the trip through the canyon in 1862 or 1863. He went perhaps once a month in the summer time, but not in the winter (R. p. 72, fols. 115-116). They traveled at one point "where the present railroad is". "Then they came right down, just followed the creek right along until we got pretty near opposite where the present Western Pacific large tunnel is * * * the Long crossing" (R. p. 74, fol. 119) * * * "then we went along there I guess for about five hundred yards and then we had to cross back again, from this point we crossed back over the creek to that side. That was quite a long crossing also" (R. p. 75, fol. 120).

The trial court found that it cannot be ascertained from the evidence whether the survey for road No. 247 is identical in any particular with the county road as now existing, or whether the highway actually traveled prior to the adoption of the present route followed the line of Survey 247 for any distance whatever (R. p. 29).

SPECIFICATION OF ERRORS ASSIGNED.

1. The State Supreme Court erred in holding that the Act of July 1, 1862, was retroactively amended and qualified by the Act of March 3rd, 1875, as to petitioners' vested title (R. p. 131, fol. 197).

2. The State Supreme Court erred in holding that the police power of the state extends to the appropriation of longitudinal strips of land within the boundaries of the right of way 400 feet in width granted by the Act of July 1, 1862 (R. p. 126, fol. 193).

3. The State Supreme Court erred in holding that respondents had acquired the right by adverse user to maintain a county road paralleling and within the boundaries of the railroad right of way granted by the Act of July 1, 1862 (R. p. 134, fol. 199).

4. The court erred in holding that the respondent County of Alameda could acquire any highway right prior to the highway grant of July 26, 1866 (R. S. Sec. 2477); or that it could acquire any license which was not defeated by the Act of Congress approved July 1, 1862 (R. p. 124, fol. 192).

5. The court erred in holding that the way traveled through Niles Canyon at or prior to the time of the railroad right of way grant was ever adopted by the board of supervisors of Alameda County as a public highway (R. p. 119, fol. 188; p. 123, fol. 191).

SUMMARY OF THE ARGUMENT.

1. *Petitioners' Right of Way Title Vested under Congressional Grant on July 1st, 1862. The State through Its Legislature Disclaimed All Interest in that Strip of Land by Acts Approved May 1, 1852 and April 4, 1864. Alameda County, a Political Subdivision of the State, Cannot be Heard in Repudiation.*

2. *The Effect of the Act of Congress Approved March 3, 1875* (18 Stat. 482) *as Amendatory of Special Grants theretofore Made by Congress Has Been Considered by this Court Favorably to Petitioners' Contention. It Was Not Within the Intent or the Power of Congress to Impair Vested Title.*

3. *The State Police Power and the Power to Acquire Highway Rights by Adverse User Could Not Extend Beyond the Railroad Company's Power of Alienation. Prior to May 25, 1920* (14 Stat. 621), *the Railroad Company Had No Power to Alienate Longitudinal Strips of the Right of Way Acquired by Congressional Grant.*

4. *There Was No Federal Grant of County Highways Prior to the Right of Way Grant of July 1, 1862, Nor Until Four Years thereafter. In the Mean Time the 400 Foot Strip Was Granted by Congress and Dedicated to the Public Service of a Railroad Right of Way. The Way Used Prior to July 1, 1862, Was Never Adopted by the County of Alameda.*

ARGUMENT.

I.

PETITIONERS' RIGHT OF WAY TITLE VESTED UNDER CONGRESSIONAL GRANT ON JULY 1st, 1862. THE STATE THROUGH ITS LEGISLATURE DISCLAIMED ALL INTEREST IN THAT STRIP OF LAND BY ACTS APPROVED MAY 1, 1852 AND APRIL 4, 1864. ALAMEDA COUNTY, A POLITICAL SUBDIVISION OF THE STATE, CANNOT BE HEARD IN REPUDIATION.

It is one thing to consider the convenience, or even the necessity, of the County of Alameda under present conditions; it is another and vastly different thing to consider the necessities, not only of the County of Alameda but of the entire State of California, the Pacific slope in general and the entire Union in that earlier period to which we must look for the determination of disputed rights, whether legal or equitable.

The state of the nation at that period with relation to conditions prompting the grant of July 1st, 1862, are vividly reflected in the opinion of this court in *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 79:

> "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of

our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but, even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occuping them which every government owes to its citizens. It is true, the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provision for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise."

The State of California was vitally interested in this project, the urgency of which had been recognized by its legislature for more than a decade. This is demonstrated in the Act of the State Legislature approved May 1, 1852, which is in words following:

"An Act to grant the right of way to the United States for railroad purposes. Approved May 1, 1852, 150.

"Whereas, The interests of this State, as well as those of the whole Union, require the immediate action of the government of the United States for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the purpose of national safety, in the event of war, and to promote the highest commercial interests of the republic; therefore,

"The people of the State of California, represented in Senate and Assembly, do enact as follows:

"Section 1. The right of way through this State is hereby granted to the United States for the purpose of constructing a railroad from the Atlantic to the Pacific Oceans (Ocean)."

The federal government required no grant from the State for a railroad right of way over federal government lands. Nevertheless, the state Act of 1852 constitutes a definite disclaimer of any adverse interest. Twelve years later, and after the federal grant, the state legislature, either assuming that its consent was necessary, or wishing to register its good will toward the project, enacted a further statute, approved April 4, 1864, entitled "An Act to aid in carrying out the provisions of the Pacific Railroad and Telegraph Act of Congress, and other matters relating thereto", * * * "hereby confirming to and vesting in said company

all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by said Act of Congress" (Stats. 1863-1864, p. 471).

Whatever the purpose, the act has the legal effect of a further disclaimer, which the state legislature has never assumed to deny. Nor could it impair the authority of the federal courts to grant a right of way for railroad construction over federal lands in the State of California. In point is the language of the Circuit Court of Appeals for this circuit in *City of Reno v. Southern Pacific Company,* 268 Fed. 751, 759:

> "It is said that the Central Pacific, having been a California corporation, had limited powers, and could not, at the time of the passage of the act of 1862, transact business or take lands in Nevada. But we are convinced that it was within the jurisdiction of Congress to grant the right of way through the territory of Nevada at the time of the passage of the act of 1862, and that the exercise of such power was not dependent upon legislative action by the State of California or the State of Nevada. Van Wyck v. Knevals, 106 U. S. 360, 369, 1 Sup. Ct. 336, 27 L. Ed. 201."

We give only passing notice to the Act of April 4, 1864, because its legal effect is nil, and the only aid it gives to appellants' argument is its tendency to show that the state legislature endorsed all that Congress had done by the Act of July 1, 1862.

In concluding this head we revert to the finding of the state trial court (R. p. 27) that the entire area involved in this proceeding was on July 1, 1862, unappropriated public land of the United States; that the railroad was fully constructed as required by the act and accepted by the President of the United States on behalf of the government. Under the authority of the leading case of *Railroad Company v. Baldwin,* 103 U. S. 426, the facts found vested title in the railroad company as of the date of the grant. This, in fine, the state courts have concluded; but they have assumed to find a qualification in that title by conditions which we shall consider.

II.

THE EFFECT OF THE ACT OF CONGRESS APPROVED MARCH 3, 1875 (18 STAT. 482) AS AMENDATORY OF SPECIAL GRANTS THERETOFORE MADE BY CONGRESS HAS BEEN CONSIDERED BY THIS COURT FAVORABLY TO PETITIONERS' CONTENTION. IT WAS NOT WITHIN THE INTENT OR THE POWER OF CONGRESS TO IMPAIR VESTED TITLE.

This head of argument treats of the first specification of error; which specification is predicated upon that conclusion of the trial court, cited and approved by the Supreme Court (R. p. 121, fol. 190):

> "The trial court's conclusions of law were that the Central Pacific Railway Company is the owner of the paramount title in fee to the land now

occupied by said highway and lying within the boundaries of said 400-foot right of way, 'subject to an easement in favor of defendant County of Alameda by reason of necessity to maintain its present right of way for highway purposes * * * subject, however, to the terms and conditions of that part of section 2 of the Act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States" (18 Stat. 482), declaring "and the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location and in as perfect a manner as the original road."' "

The opinion adopted by the State Supreme Court, written by Mr. Justice Knight of the First District Court of Appeal, but which did not receive the concurrence of his associates, does not expressly recognize the controlling effect of federal interpretation of these federal acts. It does find novelty in the federal issue, where the opinion recites (R. p. 124, fol. 192):

> "These acts have been construed at different times by the federal and state courts, and while no case identical in facts to those here presented has been cited, the legal principles employed in those cases in measuring the extent of the title granted by said acts must necessarily be applied here in determining the rights of the respective parties."

The opinion purports to find precedent in a state court decision for the vulnerability of these special government-granted right of way titles; *North Coast Railway v. Northern Pacific Railway Company,* 48 Wash. 529 (94 Pac. 113). But that decision is explained by the late Judge Rudkin, who participated in it, and who decided the Holland case in the United States District Court, holding that such rights of way are immune from the police power of the state in the matter of longitudinal highway encroachment. We shall revert later to these cases.

The views of this court have been definitely expressed. Perhaps the first case presenting the issue as to the relation of the Act of March 3rd, 1875, to railroad rights of way theretofore granted by special act is found in *Railway Co. v. Alling* (October Term 1878) 99 U. S. 463. That case had to do with the following facts:

Congress on June 8, 1872 (17 Stat. 399) granted to Denver and Rio Grande Railway Company a right of way, conditioned that the grantee should complete

its road to a point on the Rio Grande as far south as Santa Fe within five years, and complete each year thereafter fifty miles additional south of that point. The road was not completed to Santa Fe within the allotted period, and on March 3, 1877 (19 Stat. 405), Congress amended the grant of June 8, 1872, extending the period to ten years from the original act to complete the road as far south as Santa Fe. In the meantime, and after the approval of the Act of March 3, 1875, Cañon City and San Juan Railway Company asserted its claim under the latter act to occupy the Grand Cañon of the Arkansas. Mr. Justice Harlan, expressing the opinion of the court, said at page 479:

> "Our next inquiry is as to the extent to which the rights of the Denver Company were affected or modified by the act of March 3, 1875. When that act was passed, its grant of the right of way by the act of June 8, 1872, had not been acted upon as to the Grand Cañon of the Arkansas. There had not been, on March 3, 1875, an actual location of its line through that defile, nor any occupancy thereof, in good faith, for the purpose of constructing its road. The five years originally given to that company, within which to complete its railway to a point on the Rio Grande as far south as Santa Fe, expired on the 8th of June, 1877. Before, however, the expiration of that period, the time was extended to ten years from the passage of the original act. Now, it is solely by reason of such extension that the Denver Company had the right, on the 19th of April, 1878, to take possession of the Grand Cañon, and

prepare for the final location and construction of its road through that pass. When, therefore, it accepted the benefits of the act of March 3, 1877, it must be held to have assented to the provisions of the act of March 3, 1875, whereby it was declared, in the interest of the public, that any other railroad company duly organized under the laws of any State or Territory might use and occupy the cañon, for the purpose of its road, in common with the road first located."

The reasoning of the court necessarily accepts the hypothesis that the Denver Company by reason of its default had no rights whatsoever in the Grand Cañon of the Arkansas on March 3, 1875. Congress could and did waive the forfeiture and imposed upon the grant the further restrictions of the Act of March 3, 1875.

Our construction of this decision is reinforced by the opinion in *United States v. Denver & Rio Grande Railway,* 150 U. S. 1. In that case the government challenged the right of Denver & Rio Grande Railway Company to avail itself of the incidental benefits of the Act of March 3, 1875, because the company having accepted the special grant of June 8, 1872, subsisting at the time of the passage of the Act of March 3, 1875, could not rightfully claim the benefits of the latter act. The court said, at page 10:

"In that case the Denver Company (the defendant in error here) had in 1871 and 1872 merely made a preliminary survey of its line through the Grand Cañon of the Arkansas, but

had postponed the actual location and final appropriation of its roadway through that defile until April, 1878, at which date it was subject to the provisions of the act of 1875, (the second section of which conferred upon other roads the right, upon certain terms and conditions, to use its track or roadway through such defiles,) for the reason that after the passage of that act the Denver Company had accepted the benefit of the act of March 3, 1877, extending the time for the completion of its road to Santa Fe, which extension the court assumed would hardly have been given by Congress except subject to the conditions contained in the act of 1875. Being subject to the provisions of the law, as contained in the second section of the act of 1875, while in the exercise of its rights under the act of 1872, as amended by the act of 1877, in no way prevented the railway company from complying with its conditions and securing the benefits conferred by the first section of the act of 1875."

Otherwise expressed, the right of way grant to the Denver Company was in a sense executory on March 3, 1875, by reason of condition broken. The grantee was bound to accept its new privileges subject to existing law. But such is not the case before this court. Here there was no breach of condition, no failure to perform on the part of the railway company. The road was constructed long prior to the Act of March 3rd, 1875.

For the controlling principle under this head we may go back to the summary statement of the rule by

Mr. Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, 719.

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a state or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

So far as we have discovered there is no case from this court involving a right of way title fully vested prior to the Act of March 3, 1875, but the applicable principles of law seem to lead inevitably to the conclusion that the Act of March 3rd, 1875, can have no possible effect on a right of way title fully vested under special grant.

Under this point that the Act of March 3rd, 1875, cannot be given a retrospective operation, the opinion in this case refers to the Act of Congress approved June 24, 1912 (37 Stat. 138), and cites the cases of *Union Pacific Railroad Co. v. Laramie Stock Yards*, 231 U. S. 190, and *Union Pacific R. R. Co. v. Snow*, Id. p. 204, and the opinion erroneously declares the effect of these decisions as follows:

> *"On the contrary it appears therefrom that in 1912 Congress did enact legislation which had the direct effect of depriving the Union Pacific R. R. Co. of certain unusued portions of the rights of*

way previously granted to it under this very act of 1862, and the right of Congress so to do was not challenged." (R. p. 132, fol. 197.)

This court distinctly held, *contrary to the opinion of the state court,* that to give the Act of June 24, 1912, a retroactive effect "*may incur the opposition of the constitution*" (231 U. S. 200). The opinion of the state court goes on to say (R. p. 133, fol. 198):

> "But in neither case was it held, as appellants contend, that the provisions of the act of 1912 were inoperative and ineffectual against rights of way previously granted under the act of 1862; and indeed such a conclusion would have been directly contrary to the very purpose and the express language of the 1912 act. It follows therefore, that if in 1912 Congress had power to enact valid legislation controlling the right of possession to unused portions of rights of way granted by the government under the act of 1862, it was surely vested with the same power in 1875."

Petitioners respectfully submit that they did not contend that the Act of 1912 was *inoperative.* We contended that it was not *retroactive.* We contend also that the Act of March 3rd, 1875, is utterly devoid of phraseology or intent empowering railroad companies to convey, or public bodies to acquire by adverse possession. Whatever rights are conferred by the Act of March 3, 1875, are conferred directly by Congress, *not intermediately through any railroad*

grantee; and we have seen *by Railway Co. v. Alling* and *United States v. Denver & Rio Grande Railway Co.,* supra, and by the clearcut statements of Mr. Chief Justice Waite and Mr. Justice Field in the *Sinking Fund Cases,* that the Act of March 3rd, 1875, could not have any effect as an amendment of the grant of July 1, 1862 (99 U. S. 700, 719, 757). Had Congress intended to confer powers of alienation or dedication, either directly, or constructively by adverse possession, it is only fair to presume that Congress would have said so in unmistakable language, as it did in the Act of May 25, 1920 (41 Stat. 621), the language of that act being:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all railroad companies to which grants for rights of way through the public lands have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any state, county, or municipality any portion of such right of way to be used as a public highway or street: Provided, That no such conveyance shall have the effect to diminish the right of way of such railroad company to a less width than fifty feet on each side of the center of the main track of the railroad as now established and maintained."

The highway here in many places would not leave such width for railroad operation (see map R. p. 40A, fol. 70A).

III.

THE STATE POLICE POWER AND THE POWER TO ACQUIRE HIGHWAY RIGHTS BY ADVERSE USER COULD NOT EXTEND BEYOND THE RAILROAD COMPANY'S POWER OF ALIENATION. PRIOR TO MAY 25, 1920 (41 STAT. 621), THE RAILROAD COMPANY HAD NO POWER TO ALIENATE LONGITUDINAL STRIPS OF THE RIGHT OF WAY ACQUIRED BY CONGRESSIONAL GRANT.

Here, as in the brief in support of petition, we treat specifications 2 and 3 of the errors assigned; that is the erroneous conclusions (a) that the police power of the state extends to the appropriation of longitudinal strips of railroad right of way granted by special act of Congress; and (b) that such strips might be acquired by adverse user. The state court rests its opinion on the issue of police power in part upon several federal decisions involving highway *crossings* of the railroad right of way, which, of course, are not in point (R. 127, fol. 194). The opinion of the state court also claims authority upon the issue of police power upon the case of *North Coast Railway v. Northern Pacific Railway Company,* 48 Wash.; 94 Pac. 113 (R. p. 128, fol. 194) but the *North Coast-Northern Pacific case* does not purport to establish a rule governing right of way titles fully vested under special federal grant prior to the Act of March 3rd, 1875. The ruling is not out of harmony with what we have quoted from the *Sinking Fund Cases* and from *Railway v. Alling* and *United States v. Denver & Rio Grande Railway.* The Northern Pacific Railroad Company

claimed under the special right of way grant of July 2nd, 1864 (13 Stat. 365), but the right of way involved in that case was in a narrow defile, known as "Union Gap", owned by certain Indians, and was expressly regarded by the Supreme Court of Washington as not subject to the right of way grant until ceded by the Indians in 1885. The Supreme Court of Washington has to say upon this point (94 Pac. 113):

> "That portion of the right of way here in question lies within said reservation, and was not a part of the public lands within the meaning of the said act of Congress, which the United States could then absolutely grant. The reservation thereof to the Indians, therefore, remained in force until the year 1885."

This decision was long before the rule established by this court in *Nadeau v. Union Pacific R. R. Co.*, 253 U. S. 442, and *Kindred v. Union Pacific R. R. Co.*, 225 U. S. 582, to the effect that the right of way granted by the Act of 1862 was effective in Indian reservations. Whether the reasoning of the Supreme Court of Washington was sound or not under the circumstances of that case, it is clear that the court rested its decision upon the assumption that the right of way did not take effect in Union Gap until the year 1885. If the special grant of July 2nd, 1864, did not take effect *in praesenti*, it did not take effect at all (*Leavenworth etc. Ry. Co. v. U. S.*, 92 U. S. 733, 748-749), and the Northern Pacific Railway Company had to look to subsequent federal authority for its right of way

through Union Gap. The court may well have assumed, as did this court in the *Alling* case, *supra*, that any federal authority granted subsequent to the Act of March 3rd, 1875, was conferred in view of that grant and subject to its limitations.

The late Judge Rudkin of the Ninth Federal Circuit was a member of the Supreme Bench of Washington when the *North Coast-Northern Pacific case* was decided. It was he who rendered the decision in the eastern district of Washington in the case of *Holland Co. v. Nor. Pac. R. R. Co.*, 208 Fed. 598, 603. That case denies the power of the railway company to alienate a longitudinal strip of its congressional right of way for highway purposes. The opinion declares, page 603, that the power of the railroad company to dispose of any part of its right of way of its own volition is measured by what it may be compelled to do under the police power of the state. Conversely, the police power of the state cannot extend beyond the power of the railroad company to give its voluntary consent, because both propositions are limited in the same degree by the same federal restriction. Nowhere in the federal statutes prior to May 25, 1920 (41 Stat. 621) can be found any authority for the alienation for highway purposes of any portion of a railroad right of way granted by special act of Congress.

On appeal of the *Holland case* to the Circuit Court of Appeals for the Ninth Circuit (214 Fed. 920) the appellate tribunal considered the authorities uphold-

ing ways laid out *across* the right of way, and held at page 926:

> "But in no substantial sense do these considerations apply to the case of a street or other highway laid out along, instead of across, the right of way. Granting the need of a road running parallel or in the same general direction with the railroad, there is no necessity for imposing the burden thereof upon the right of way. It is hardly probable that the practice of so locating a highway was common at the time the act was passed, and, upon the whole, it is unreasonable to suppose that Congress anticipated that such a use would ever be made of the right of way. It imposes a much greater burden than a mere crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use."

The opinion in the instant case justifies the longitudinal encroachment upon the theory that a crossing under present conditions may well be a much "greater burden" (R. p. 130, fol. 196). The rights of the public under the police power are not measured by the yardstick of *public convenience,* but rather of *public necessity.* It is absolutely necessary that the public may pass from one side of the right of way to the other; it is not necessary that the public should have the freedom of the roadbed longitudinally. The highway need not follow the canyon bed; the railroad *must.*

The opinion comments that appellants do not allege in the complaint "that the existence of said highway ever has interfered with the operation of their railroad, or their program of railroad expansion, nor that it is likely to do so in the future" (R. p. 131, fol. 197). An allegation of that character would be out of place inasmuch as that is a question of law settled by Congress itself. *"By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance."* (*Nor. Pac. R. R. Co. v. Smith,* 171 U. S. 261, 275.)

Taken literally this language would conclude the court regardless of the purpose for which an adverse right be claimed. If it be conceded that this language is elsewhere qualified, still the opinion does not even suggest power of alienation or liability to loss by adverse user of longtitudinal portions of right of way for public purposes. Under the *Interstate Commerce Act,* section 1 (Subdv. 18), a common carrier may not alienate or abandon any part of its property for any purpose without first having obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity will not be prejudiced.

The Supreme Court of California has long recognized the principle clearly expressed by the Supreme Court of the United States that a railroad right of

way is itself a public highway of a special and restricted nature. In *Southern Pacific Company v. Hyatt,* 132 Cal. 240, 242, 243, the state court quotes from *Olcott v. Board of Supervisors,* 16 Wall. 678, saying:

> "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence."
>
> * * * "It is said that railroads are not public highway *per se;* that they are only declared such by the decisions of the courts; and that they have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such."

The same case quotes with approval (page 244) the general rule declared in Jones on Easements:

> "Jones on Easements lays down the rule that the prescriptive right to a passageway along the track or right of way of a railroad cannot be acquired by the public, or by individuals, while the railroad is constantly using a single track over such right of way. The construction and operation of one track on its location is an assertion of right to the entire width of its right of way. The presence of one track constantly in use is a definite badge of ownership and the only practical assertion of title that can be made. If the public has used paths by the side of the rail-

road track for any length of time, the use must be considered as permissive, and not adverse. (Citing a long list of authorities from different states; Jones on Easements, sec. 281, p. 232.)"

This permissive use of portions of railroad rights of way not immediately required for railroad use is recognized and held not to be prejudicial in many federal cases. It is so expressed in the *Holland* case, *supra*, and again in *Barnes v. Southern Pacific Company* and *Mulvihill v. Southern Pacific Company*, 16 Fed. (2nd) 100, 104:

"Congress has not authorized the disposition of unused portions of the right of way. The power of the railroad company to alienate, as well as the power of others to acquire, any part thereof, is measured, not by what can be spared from railroad uses, but by what is required to meet such needs of the public or of individuals as fall within the scope of the principle already discussed. Privileges conferred by revocable licenses are, of course, excluded. In such cases the railroad company never loses its right to possession and control."

Again in *Williams, Mayor et al. v. Atlantic Coast Line R. Co.*, 17 Fed. (2nd) 17, 21, it is said that the law does not require a railroad in order to preserve its right of way, to act the dog in the manger and churlishly refuse to allow the public to use a portion of its right of way for a street or road where such portion

is not then needed. The court in that case enjoined the town of Mullins, South Carolina, from laying hard surface paving on portions of a street within the railroad right of way, notwithstanding the fact that there was in that case no legal restriction on the company to convey or dedicate, and the city had used the street for half a century (page 21). The court approved the rule, page 20, that no right could be acquired by the town by prescription, and on page 21, that there was no element either of estoppel or abandonment presented by the circumstances.

In *Heilbron v. St. Louis S. W. Ry. Co. of Texas*, 52 Texas Civil Appeals, 575, 581 (113 S. W. 613):

> "To hold that the mere use by the public, without objection, of a portion of a railway right of way, and continued during the statutory period of limitation, or for twenty years, would cause the railway company to lose the use of its property which it may need for legitimate purposes connected with its operation, would cause unutterable confusion and bring about in this state a condition of affairs which would seriously interfere with railway traffic. A railroad is itself a public highway, constructed and operated for the public benefit, and some courts have gone so far as to hold that a right by prescription, or limitation, cannot be acquired against a railroad to any portion of its right of way. Southern P. Ry. Co. v. Hyatt, 54 L. R. A., 522; Northern P. Ry. Co. v. Smith, 171 U. S., 260; Jones on Easements, sec. 281, and authorities cited in note. There are many portions of railway tracks and rights of

way, especially around and near depots in cities and large towns, where the public use the right of way for passing to and fro continuously, and where such use has been kept up in some cases far beyond the period of time necessary to create an absolute easement—yet no court in this state has ever treated such persons, when injured while using the railway right of way, as more than licensees."

IV.

THERE WAS NO FEDERAL GRANT OF COUNTY HIGHWAYS PRIOR TO THE RIGHT OF WAY GRANT OF JULY 1, 1862, NOR UNTIL FOUR YEARS THEREAFTER. IN THE MEAN TIME THE 400 FOOT STRIP WAS GRANTED BY CONGRESS AND DEDICATED TO THE PUBLIC SERVICE OF A RAILROAD RIGHT OF WAY. THE WAY USED PRIOR TO JULY 1, 1862, WAS NEVER ADOPTED BY THE COUNTY OF ALAMEDA.

To argue that no public highway existed through the pass of Niles Canyon prior to the right of way grant of July 1, 1862, does not imply that those who may have had occasion to travel through Niles Canyon were trespassers on the public domain. On the other hand, to concede that these occasional travelers passed through the canyon as a matter of right is not an admission that the privilege was absolute or anything more than a license by the federal government. The highway grant of July 26, 1866, is explicit in terms and purpose: "The right of way for the construction of highways over public lands, *not reserved for public*

uses, is hereby granted" (R. S. Sec. 2477; U. S. C. A. Title 43, Sec. 932). It is not necessary to dwell upon the familiar interpretation of the term *"hereby granted"*. The right of way would vest whensoever the public agency, state or county, should adopt a road over public lands; provided, however, that the lands were not at the time of adoption of the road "reserved for public uses". While a right of way appropriated prior to July 26, 1866, may be assumed to have vested on approval of the grant, that could not be where the chosen route had, as here, previously been granted by Congress, or reserved for public uses.

The opinion below recognizes the lack of congressional authority for the county highway through Niles Canyon. The court quotes from *Town of Red Bluff v. Walbridge,* 15 Cal. App. 770, and says (R. p. 124, fol. 192):

> "As against the federal government it (the county here) could not perhaps make a public highway over its lands without its consent or acquiescence, but the federal government is not complaining and its policy has always been to encourage the building of highways over the public domain, thereby facilitating its settlement and use, and the policy was crystallized into a statute passed on the 26th day of July, 1866."

The court below refers to the Niles Canyon highway as a way of necessity (R. p. 121). The doctrine of ways of necessity is foreign to the facts, there being

no privity or other relation whatsoever between the railroad company and the county. Fundamentally the rule is exactly as applied by the United States District Court for the Southern District of California in *United States v. Rindge et al.*, 208 Fed. Rep. 611, 619:

> "What is commonly called a right of way from necessity arises when the owner of a tract of land conveys a portion thereof to another and there is not access from a public highway to the part so conveyed except over the remaining lands of the grantor, or a stranger, or when the owner sells a portion of his land and the part remaining is inaccessible except over the land sold or that of a stranger."

The opinion in that case briefly analyzes the effect of the congressional grant for highway purposes (Id.):

> "By public statute Congress has granted rights of way for the construction of highways over public lands not reserved for public use. Act of Congress July 26, 1866, c. 262, 14 Stat. at L. 253. Beyond this and the full protection of the title which it confers, it would seem that the government owes no duty or obligation and reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of the grantee was acquired."

The court says further on the same page, denying the theory of a way of necessity:

"The logical result of this contention is that a way is reserved by implication for the use of such persons over all land granted by the government to reach the remaining subdivisions when there is no other reasonable or convenient means of access, notwithstanding there is no such reservation in the grant, and there is no public law so providing."

Nor is it a fact that the topography of Niles Canyon offers any serious obstacle to modern highway construction. We may look to the opinion itself for the statement that in 1910 or thereabouts the county found it practical "to reconstruct much of its highway, and in doing so it moved a considerable stretch, lying about midway between Stony Brook and Sunol, within the railroad right of way and on the north side of the creek, to the south side of the creek and outside of the right of way" (R. p. 120, fol. 189). This court may judicially know what is matter of common knowledge, that highway engineers today are not balked by mountains or canyons, and are governed as much by scenery as by facility of construction. In fact it is not unusual in highway construction in the hills to forego established routes in the beds of canyons for shorter, more practicable and more scenic routes at higher levels.

The record is conclusive that the line adopted by the board of supervisors of Alameda County in 1859 is north of Alameda Creek throughout its entire distance through the canyon. It is equally conclusive

that the way traveled was on both sides of the creek and in considerable part in the bed of the creek. The Geological Survey of the Pleasanton Quadrangle in 1904 shows four crossings near the westerly end of the canyon which are not shown to have any relation to the route described by the three witnesses from personal recollection. These four crossings shown on the topographic sheet certainly have no relation to the route adopted in 1859 and shown on Defendants' Exhibit B (R. p. 60A, fol. 98a). Only one of the crossings used in 1904 is apparently in the same location as at present (Plaintiffs' Exhibit 6 (p. 40A, fol. 70a)). Naturally those seeking passage through the canyon in the early period, when no improved way existed, followed the route of easiest travel, largely in the bed of the creek when that was possible. When the water was high they remained at home or sought another way out. Under our statute travel through the canyon by few or by many did not constitute the route of travel a public road. The California Statute of April 26, 1858, provides, in section 1, that:

> "All roads in the counties of Tuolumne and Alameda shall be considered as public highways, which are now used as such, and have been declared such by order of the court of sessions or board of supervisors, or which may be declared such hereafter, by the board of supervisors within their respective counties; *provided,* that nothing in this act shall apply to any incorporated city or town within the counties named."

The route adopted by the board of supervisors was never opened, and the way used was never adopted.

> "Public highways are such only as come within the express provisions of the statute declaring them to be such, and that roads established without authority of law, for the convenience of individuals, are without any legal status either as public highways or as private ways."
>
> *Tucson Consolidated Copper Co. v. Reese* (Ariz.), 100 Pac. 777, 778.

The foregoing is typical of the many decisions upon that familiar issue, not a few of which are collated under the note to section 932 of Title 43 U. S. C. A. We think it unnecessary to pursue the argument upon this well established rule.

This principle, coupled with the undisputed and indisputable line of route for road No. 247 in 1859, *entirely north of Alameda Creek,* renders wholly nugatory any oral testimony to the contrary. It also destroys the effect of the words of the State Supreme Court (R. p. 122, fol. 191):

> "The record shows beyond question that all of the proceedings for the establishment of a public highway from Niles to Sunol were taken by the county and completed long before the enactment of the Pacific Land Grant Act of 1862 and consequently long prior to the time the railroad acquired any rights whatever in the canyon."

If we assume, with the State Supreme Court, that the County acquired a highway route as exhibited on the plat of survey (Defendants' Exhibit B, R. p. 60A, fol. 98a), that would not carry the further right to shift the location at pleasure or convenience. The rule is recognized in California, as in other jurisdictions, and as expressed in *Felsenthal v. Warring*, 40 Cal. App. 119, 125-126:

> "The acquisition of a right of way over one portion of a person's land, whether by grant or prescription, gives the grantee no right over any other portion. It is entirely immaterial that the new line was only from twenty-five to forty feet distant from the old line. It was upon the property of appellant, over which respondents had no right whatever, and the principle is the same as if the new line had been hundreds of feet away from the old one. (Vestal v. Young, 147 Cal. 715, (82 Pac. 381).)"

In conclusion, the practical importance of a decree for petitioners as prayed lies in this: that in case of need for improved alignment, or expansion of facilities, or as a measure of safety, the railway company should have the unquestioned power to require a shifting of the highway to a new location. The railroad company requires present assurance that the rights and privileges granted by Congress may be exercised in full performance of the public service contemplated by the grant, and this whenever it may become expedient, and without the danger of being

blocked by dilatory and stubborn resistance on the part of the county, causing long and costly delays, and incidentally impairing or effectively defeating any plan of railroad improvement or expansion.

It is respectfully submitted that the decision of the Supreme Court of the State of California is contrary to the applicable decisions of this court and to established law upon all grounds here urged, and that said decision should be reversed with instructions to enter judgment for petitioners as prayed in their complaint (R., p. 7, fols. 12-13).

Dated San Francisco, November 13, 1931.

C. F. R. OGILBY,
1422 F Street, N. W.,
Washington, D. C.
FRANK THUNEN,
65 Market Street,
San Francisco, Calif.
Attorneys for Petitioners.

GUY V. SHOUP,
65 Market Street,
San Francisco, Calif,
Of Counsel.

FILE COPY

SEP 5 1

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW and FREDERICK STOW, *Respondents and Respondents below.*

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPRPEME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

T. P. WITTSCHEN,
Latham Square Building, Oakland, California.
EARL WARREN,
District Attorney of the County of Alameda, State of California.
RALPH E. HOYT,
Chief Assistant District Attorney of the County of Alameda, State of California.
JAMES H. OAKLEY,
Deputy District Attorney of the County of Alameda, State of California.
Attorneys for Respondents.

SUBJECT INDEX

	Page
PETITION	1
BRIEF	6
ARGUMENT	6
I. The Act of July 1, 1862, was not an unqualified grant vesting title incapable of and entirely beyond any sort of modification by Congress	6
II. Title of grantees under the Act of July 1, 1862, are subject to public rights obtained by adverse user commensurate with the States' police power	9
III. The necessity for the particular highway is established, the highway has been established since 1859, and no estoppel arises to prevent the County from asserting its easement	14
CONCLUSION	20

TABLE OF CASES CITED

	Page
Heilbron v. St. L. S. W. Ry. Co., 52 Tex. App. 575, 113 S. W. 613	11
Holland Co. v. Nor. Pac. R. R. Co., 208 Fed. 598	12
Holland Co. v. Nor. Pac. R. R. Co., 214 Fed. 920, 926	12
North Coast Ry. v. Nor. Pac. Ry. Co., 48 Wash. 529, 94 Pac. 113, 114, 115	13, 17
Northern Pac. Ry. Co., v. Townsend, 190 U. S. 267	11, 13
Railway Co. v. Alling, 99 U. S. 463	8
Sinking Fund Cases, 99 U. S. 700	9
Southern Pac Co. v. Hyatt, 132 Cal. 240, 64 Pac. 272	10
Union Pac. R. R. v. Laramie Stock Yards, 231 U. S. 190	7
Union Pac. R. R. v. Snow, 231 U. S. 204	7
United States v. D. & R. G. Ry., 150 U. S. 1	8
Williams v. Atlantic Coast Line R. Co., 17 Fed. (2nd) 17	11

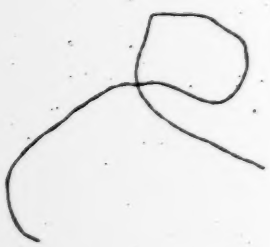


TABLE OF STATUTES CITED

	Page
Act of July 1, 1862 (12 Stat. 489, 497)	6, 7, 9
Act of Mar. 3, 1875 (18 Stat. 482)	2, 3, 4, 7, 9, 14
Act of May 7, 1878 (20 Stat. 56)	9
Act of June 24, 1912 (37 Stat. 138, 139)	7
Act of May 25, 1920 (41 Stat. 621)	9
Calif. Stat. of May 1, 1852 (Stat. of 1852, p. 150)	19
Calif. Stat. of Apr. 4, 1864 (Stat. of 1863-4, p. 344)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW and FREDERICK STOW, *Respondents and Respondents below.*

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPRPEME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

In answer to the Petition for Writ of Certiorari on file herein dated July 10, 1931, respondents County of Alameda, a body politic and corporate, Chas. W. Heyer, Ralph Richmond, John F. Mullins, Redmond C. Staats and William J. Hamilton, Members of the

Board of Supervisors of said County, respectfully show:

1. Deny that as to those three certain parcels of land, designated in the Findings of Fact and Conclusions of Law of the Trial Court in this action as parcels "D", "E", and "F" (R. p. 37, at 47-51), said Trial Court found the Central Pacific Railway Company's title qualified by Section 2 of the Act of Congress, approved March 3, 1875 (18 Stat. 482), being the general act granting railroad rights of way through the public domain; and in this connection allege that the Trial Court found that Central Pacific Railway Company was entitled to possession of said parcels, and each of them, subject to an easement in favor of County of Alameda by reason of necessity to maintain said County's present right of way for highway purposes, subject, however, to the terms and conditions of Section 2 of said Act approved March 3, 1875.

2. Deny that in affirming the judgment of the Trial Court the Supreme Court of the State of California held that this railroad right of way granted by special act of Congress is amenable to the police power of the state for longitudinal highway encroachments; and in this connection allege that said Supreme Court held that since the United States courts had ruled that such rights of way are amenable to the state police power through the exercise of the right of eminent domain,

it would be "wholly illogical to hold . . . that the same character of easements, subject to the same conditions, may not be acquired by the public by adverse user extending over a long period of years, . . ." and that under the facts of this case respondent County had acquired such an easement (R. pp. 196-7, 81 Cal. Dec. 652, 659).

3. Deny that said State Supreme Court held that the special right of way grant of July 1, 1862, was amended by the Act of March 3, 1875, authorizing the joint occupancy of the right of way by the railroad and by the highway; and in this connection allege that said Court held that whatever might be the law as to the effect of said Act of March 3, 1875, respondent County "is nevertheless clearly entitled to a decree under the doctrine of adverse user, . . ." (R. p. 203; 81 Cal. Dec. 652, 664).

4. Deny that the ruling of the State Supreme Court to the effect that the police power extends to the taking of longitudinal strips of railroad right of way specially granted by Congress is inconsistent with numerous or any rulings of the Supreme Court of the United States.

5. Deny that the ruling that longitudinal portions of railroad right of way may be acquired by adverse possession is contrary to the or any decisions of this Court and are contrary to the general rule that the

continuous operation of a railroad on the right of way forestalls adverse rights in the general public.

6. Deny that the ruling of the State Court that the right of way grant of July 1, 1862, was, as to vested title, qualified and diminished by the Act of March 3, 1875, is inconsistent with the ruling of this Court in the cases mentioned or any other cases.

WHEREFORE, respondents pray that said Petition for a Writ of Certiorari be dismissed with costs.

Dated: Oakland, California, September 1, 1931.

T. P. WITTSCHEN,
Latham Square Building, Oakland, California.

EARL WARREN,
District Attorney of the County of Alameda, State of California.

RALPH E. HOYT,
Chief Assistant District Attorney of the County of Alameda, State of California.

JAMES H. OAKLEY,
Deputy District Attorney of the County of Alameda, State of California.

Attorneys for Respondents.

STATE OF CALIFORNIA,
COUNTY OF ALAMEDA. } ss.

WM. J. HAMILTON, being first duly sworn, deposes and says that he is one of the respondents in the above entitled proceeding, and further that he is the Chairman of the Board of Supervisors of the County of Alameda, State of California, which said County is likewise one of the respondents in this proceeding; that as presiding officer of the governing body of said County he makes this verification for said County of Alameda and likewise for the members of said Board; that he has read the foregoing answer to the Petition for Writ of Certiorari, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

WM. J. HAMILTON.

Subscribed and sworn to before me this 2nd day of September, 1931.

(SEAL)

Notary Public in and for the County of Alameda, State of California.

BRIEF IN SUPPORT OF ANSWER TO PETITION.

ARGUMENT

Petitioners' statement of the facts of this case embodied in their petition and under the heading "III, Statement of the Case," is substantially correct, though it is believed a better comprehension of the facts and the issues may be gained from the opening paragraphs of the opinion of the Court below (81 Cal. Dec. 652, 653-6, 299 Pac. 75).

Preliminarily, it may be said that respondents take no issue with the assertion that a federal question is involved, for the whole controversy turns upon the construction to be given to certain federal statutes. Nor is it denied that there is a certain novelty in the points at issue. Whether the matter is of such nature as to require the further consideration of this Court will no doubt turn upon this Court's estimate of the State Court's decision. (Rules of Supreme Court, Rule 38, Sec. 5a). The opinion is attacked upon three grounds, which will be taken up in the order presented.

I.

The Act of July 1, 1862, was not an unqualified grant vesting a title incapable of and entirely beyond any sort of modification by Congress.

This is apparent from the statute itself, which,

among other limitations (such as forfeiture for failure to complete a certain amount of construction within a limited time), contained the provision (in Sec. 17, 12 Stat. 489, 497) that "Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

The Act of June 24, 1912 (37 Stat. 138) effected a qualification of the 1862 grant, in that it was therein provided that adverse possession might ripen into title as against a railroad claiming under the earlier grant. If Congress could have enacted legislation in 1912 that opened a way whereby individuals might acquire unused portions of rights of way granted in 1862, it certainly could have done so in 1875. The Act of March 3, 1875, (18 Stat. 482) required railroad companies whose lines passed through narrow canyons to permit public highways "necessary for the public accommodation" to occupy their rights of way. Such limitations as these statutes provide are obviously inconsistent with the idea of a vested title utterly beyond encroachment or entirely out of the reach of the granting power.

The Act of 1912 has been construed in the cases cited by Petitioners (*Union Pac. R. R.* vs. *Laramie Stock Yards,* 231 U. S. 190, and *Union Pac. R. R.* vs. *Snow,* 231 U. S. 204). The doctrine of those cases has been explained by the State Court (R. pp. 201-203, 81

Cal. Dec. 662-663), and it is believed no further comment is necessary.

The Act of 1875 seems never to have been considered in the reported cases in connection with a public highway upon a railroad right of way. Petitioners refer to two decisions of this Court concerning rival railroads each desirous of establishing its line through narrow mountain passes. (*Railway Co.* vs. *Alling,* 99 U. S. 463; *U. S.* vs. *D. & R. G. Ry.,* 150 U. S. 1). Their construction of these cases would appear to limit the effect of the Act of 1875 to instances where a company had originally obtained a land grant subject to compliance with certain conditions, then failed to meet the conditions, and while in such position suffered the imposition of the new conditions imposed in the intervening statute of 1875, Congress subsequently waiving the forfeiture and extending the construction time limit. Nothing in the Act, however, justifies a limitation of its application to such facts. The language used is broad and inclusive, and apparently was designed to establish as a general rule "That any railroad company whose right of way . . . passes through any canyon, pass or defile, shall not prevent any other railroad company from the use and occupancy . . . And the location of such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon

road or highway where such road or highway may be necessary for the public accommodation; . . ." (Sec. 2 of 18 Stat. 482).

Petitioners' reference to the Sinking Fund Cases, 99 U. S. 700, is beside the point. The principle quoted from the opinion of Mr. Chief Justice Waite is one that no one is ever likely to question in this Court. The controversy arises only as to its application to particular cases. It would be idle to discuss it in a case where Congress reserved the right to alter, amend or repeal in the grant itself. The manner and scope of limitations which may properly be imposed are illustrated by the two enactments above referred to, and also by the Transportation Act of May 25, 1920 (41 Stat. 621), which permitted land grant railroads to alienate portions of their lands. In reference to the cases mentioned it is interesting to note that Chief Justice Waite's statement of the rule mentioned was only preliminary to holding that a subsequent Act (that of May 7, 1878) was not a repudiation of any contract entered into by the Government by reason of the Act of 1862.

II.

Title of Grantees under the Act of July 1, 1862, are subject to Public Rights Obtained by Adverse User commensurate with the States' Police Power.

This case is not concerned with the lack of authority

of a land grant railroad to divest itself of title to a portion of its right of way by grant, abandonment or dedication; nor are we concerned whether an individual may acquire rights in such property by prescription. It may be conceded that in neither of such instances will the courts permit encroachments as against the railroad. We are here concerned, however, only with the propqsition of whether the public can use so much of the railroad's right of way as may be reasonably necessary under the rather unique facts of the case.

The necessity for the encroachment is summarized in the findings of the trial court in the following language (R. p. 50):

> "That the topographical, geographical and other physical features and conditions existing in the disputed portions of the right of way through Niles Canyon, viz: the narrowness of the canyon, proximity of Alameda Creek which in the winter season becomes a torrential stream sometimes capable of destroying bridges and roadways, and the steep sides of the canyon make it practically necessary to maintain the highway through the disputed territory because of the overwhelming difficulties to substitute a different route in those places where the road is within the 200 foot limit from the center line of main track of railroad."

Southern Pacific Co. v. *Hyatt,* 132 Cal. 240, is mentioned by Petitioners (Brief pp. 23-24) as supporting their view as to inviolability of their right of way.

That case involved only the right of an individual to acquire by adverse user. The dictum concerning the rights of the public, while perhaps correct in the ordinary situation, cannot weigh heavily under the extraordinary facts of the instant case.

Likewise, the Texas case (*Heilbron* vs. *St. L. S. W. Ry. Co.* 52 Tex. Civ. App. 575, 113 S. W. 613, referred to on pp. 25-26 of Petitioners' Brief) did not involve any such necessity as appears in this case. The same is true of *Williams* v. *Atlantic Coast Line R. Co.* 17 Fed. (2nd) 17 (Brief p. 24).

In *Northern Pacific Ry. Co.* v. *Townsend,* 190 U. S. 267, another case cited by Petitioners (Brief pp. 23-24), the distinction between rights of the public and of individuals with relation to Federal right of way grants is recognized. This court there remarked (P. 272):

> "Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of railroad crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

Other cases holding that lands acquired from the Government for railroad purposes remain at all times subject to exercise of the state's power of eminent domain are mentioned in the decision under review (R. pp. 195-6, 81 Cal. Dec. 652, 659), and further comment is deemed unnecessary. Suffice it to say that where the necessity is apparent from the circumstances proven, the needs of the public will not be sacrificed in favor of maintaining the rigidity of a trust which could not have been within the contemplation of the granting power.

Strong reliance is placed upon *Holland Co.* v. *Nor. Pac. R. R. Co.* 208 Fed. 598, 214 Fed. 920 (Brief pp. 21-22), wherein, it is claimed, the right of the public to acquire a longitudinal easement for a public highway was denied. Here again, however, there was involved no such necessity as arises in the case at bar. The court was speaking of a public street within a town and over flat lands. After stating (214 Fed. 920, 926) that "public use implies an underlying necessity and the fundamental consideration therefor is that of superior need", and explaining that crossings for public highways must have been within the contemplation of Congress at the time of the grant, so that the grant includes an implied limitation for ways of necessity, the following significant statement occurs (214 Fed. 926):

"We do not say that a case is inconceivable

where for a limited distance, some concession may not properly be made for this or an analogous purpose, but the necessity must be great and the conditions unusual in the extreme to warrant it."

Respondents cannot agree with the assertion (Petitioners' Brief, p. 19) that for authority to take longitudinal strips of right of way by eminent domain the opinion of the State Supreme Court rests entirely upon the case of *North Coast Ry.* v. *Nor. Pac. Ry. Co.* 48 Wash. 529, 94 Pac. 113. The passage just quoted from the *Holland* case, together with the principle announced in the *Townsend* case (*supra,* 190 U. S. 267, 272) support the same conclusion. Nor can we concede that "it is clear that the (Washington) court rested its decision upon the assumption that the right of way did not take effect in Union Gap until the year 1885". The Washington court considered and relied upon many of the cases cited in the opinion of the California court (R. pp. 195-6, 81 Cal. Dec. 658-9) and said (94 Pac. 114):

"It is true the most, if not all, of the last-cited cases related to crossings of other railways . . . whereas the tract here sought . . . is a longitudinal tract about three-fifths of a mile in length, to be carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railroad and those of the public service. . . . It is therefore held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the neces-

sities of the two companies in the interest of the public service is sufficient to warrant it."

Moreover, it was expressly held in that case that the Act of March 3, 1875, had no bearing on the situation. (94 Pac. 115):

"With this view it is unnecessary to examine the question discussed in the briefs as to whether the act of 1875, being subsequent to that granting the right of way, applies here."

III.

The necessity for the Particular Highway is Established, The Highway Has been established since 1859, *and no Estoppel arises to prevent the County from asserting its easement.*

In the closing portion of their brief Petitioners evidently contend that there exists no real necessity for the route of the highway involved, that there never was a public highway there prior to occupancy by the railroad, and that the state, having expressly approved the grant of 1862, should not now be heard to say that it needs the road which has been there since 1859.

In disputing the argument of necessity, they are forced to go back of the findings in the case. It is respectfully submitted that by all known rules of law those findings are not now open to attack if based upon any substantial evidence. The following excerpts from the record sufficiently indicate that the finding of necessity was well founded:

"A. (To question by Mr. St. Sure for the County): Of course, at the present time there are several places where the road is outside of the four hundred foot right of way. In other places, in attempting to construct a road outside of the four hundred foot right of way we probably would run up against a proposition of steep hillsides that would require very expensive cuts, long slopes, and consequently heavy embankments. The road is located in the bottom or at the foot of the slope in an endeavor to reduce the grade as much as possible. If the relocation was placed on the hillside the grade would be materially increased. As to the length of the roadway it would require the road way to go back into the various canyons as you come to them instead of following up the face of the defile itself. Undoubtedly the road would be more dangerous because of the high slopes and the tendency for the rock and other material to fall down the road, and the expense would be very much greater than a road constructed at the foot of the slope. I don't know whether I can add anything to that answer or not; in other words, the relocation of that roadway outside of the four hundred foot strip would entail additional expense and additional grade and length of road and would endanger the people traversing the same by reason of the slopes, the tendency of the slopes to cave and rocks fall down.

Q. Summing up these facts, will you state whether it is your opinion that it is practicable and feasible?

A. A road can be built most anywhere regardless of the expense. It would be most practicable to build a road at the foot of the slope and my answer would be that it would not be practicable if it can be placed at the foot.

Q. You mean it is possible not feasible?
A. Possible but not feasible."
(R. pp. 135 to 137.)

And a little later the same witness testified:

"It would be either on the hillside, on the slope of the hill, or on the top. It would not be feasible for people on the south side to use a road that would be located on the north side and therefore probably would have to have two roads to allow people on both sides to go out." (R. p. 139).

And also:

"If a new road is built through there it may take ten years or more before the slopes become suitable, and consequently you will have slides on account of the slopes and also the rains and other debris dropping down onto the roadway and endangering passing vehicles and people." (R. p. 150).

The railroad's own engineer testified in this regard:

"Q. (By Mr. Thunen): What conclusion did you reach as to the practicability of relocating that highway outside of the railroad right of way lines?

A. My conclusion was it could be located outside of the railroad right of way, but that the present road was the better alignment. It could be put over on the other side of the creek.

Q. Are there any very serious obstacles in the way of construction outside of the railroad right of way?

A. I could see none that were very serious, but it would entail considerable cost, but from an engineering standpoint I believe it could be located

on the south side if necessary." (R. pp. 171-172).

As indicating what degree of necessity is requisite in matters of this kind, reference is again made to the Washington decision (*North Coast Ry.* v. *No. Pac. Ry. Co. supra,*) where it was claimed that a sufficient showing on this point had not been made (94 Pac. 115):

> "It is true it is not shown to be impossible to construct . . . a line . . . on . . . claimant's right of way . . . if a sufficient amount of money is expended and the increased dangers are not considered. It does appear, however, that it is not reasonably practicable to adopt either of the routes proposed by claimant when all the surroundings are considered . . . A reasonable public necessity is all that is required to authorize the condemnation of property already devoted to a public use."

Petitioners argue (Brief pp. 27-28) that in view of the alleged divergence between the line adopted by the Board of Supervisors of Alamda County in 1859 and the route actually travelled, there was actually no public highway through Niles Canyon. Here again they are met by the finding of the trial court. (R. pp. 49-50):

> "That in the year 1859 defendant Alameda County surveyed and laid out through the said Niles Canyon, under Survey No. 247, a county road which was in the same year declared by the Board of Supervisors of said county to be a public highway; . . . that for more than sixty years there has existed with the knowledge of plaintiffs and

> their predecessors a highway for ordinary vehicular travel through Niles Canyon; but the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that those parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County Road No. 4974, are a part of the present traveled road; . . ."

This finding necessarily adopts the hypothesis that the road laid out and traveled was that referred to in the survey adopted by the supervisors. At the trial Petitioners sought to establish that the road traveled did not conform to the survey by testimony of their own engineer that he had attempted to re-run the old line and found it to be placed on the side of the canyon where admittedly no road had existed. However, it is further evident from the testimony that the old survey was made by a method now regarded as inaccurate and long since discarded, and that monuments therein mentioned are now impossible of location. Mr. Posey, Respondents' engineer, stated (R. p. 131) that "it would be very difficult to replace a line . . . on the ground as the road was intended to be in the beginning, being that the bearings are only to the nearest quarter of degree. A surveyor of this day and age would have a very difficult time relocating that roadway."

Furthermore, the testimony of several old settlers indicate that they traveled over the road before the rail-

road was built (which was 1867-8: R. p. 46), and that the existing road corresponds with the one so traveled except for certain changes of alignment made in 1911. (Testimony of Mr. Richard, beginning R. p. 101, and Mr. Buttner, R. p. 114).

Again, there is evidence that the old survey was not remote from the creek. One of the petitions for change in alignment states: "If a road was made upon the present surveyed route it would be destroyed by the first rise of the creek." (R. p. 167).

In reference to the contention (Brief p. 29) that the state memorialized Congress in 1852 for the purpose of granting a right of way through the state for a transcontinental railroad (Calif. Stat. of May 1, 1852) and subsequently ratified the grant (Calif. Stat. of Apr. 4, 1864), it seems obvious that by such action the state did not and could not reasonably be said to have thereby rendered the rights and conveniences of the public which supported the railroad subservient to the latter's claim to a title out of reach even of a superior public use.

Assuming that the Federal Government has an interest to maintain in this case, as is contended (Brief p. 29), it would seem that the railroad company is not the one to assert it. No complaint has been heard from the United States, and it is respectfully submitted that

through its courts the Government has recognized the need for such encroachments as that complained of here.

CONCLUSION:

Under all the circumstances, it is submitted that no substantial ground for further proceedings in this case has been shown, and a writ of certiorari should not issue.

Dated: September 1, 1931.

T. P. WITTSCHEN,
Latham Square Building, Oakland, California.

EARL WARREN,
District Attorney of the County of Alameda, State of California.

RALPH E. HOYT,
Chief Assistant District Attorney of the County of Alameda, State of California.

JAMES H. OAKLEY,
Deputy District Attorney of the County of Alameda, State of California.

Attorneys for Respondents.

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	
I. The Facts	1
II. The Issue	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. Neither Congress, by the Act of July 1, 1862, nor the State of California, in urging and confirming the grant, contemplated the ousting of the public from the use of its highways	8
II. The Act of July 1, 1862, was not an unqualified grant vesting a title wholly beyond the power of Congress to modify; and the railroad holds subject to the conditions of the Act of March 3, 1875	8
III. The title of the railroad derived from the Act of July 1, 1862, is subject to public rights obtained through adverse user commensurate with the police power of the State	10
IV. The highway involved was established and has been in use since 1859; the necessity therefor is established; the United States Supreme Court will not undertake to examine a local question upon which the State Court has spoken	16
CONCLUSION	26
	33

TABLE OF CASES CITED

	Page
Cohen v. Virginia, 6 Wheat. 264, 5 L. Ed. 257	29
Donahue v. Vosper, 243 U. S. 59, 37 S. Ct. 350, 61 L. Ed. 592	29
Heilbron v. St. L. S. W. Ry Co., 52 Tex. Civ. App. 575, 113 S. W. 613	17
Holland Co. v. Nor. Pac. R. R. Co., 208 Fed. 598	17, 20
Holland Co. v. Nor. Pac. R. R. Co., 214 Fed. 920	17, 21, 22
Illinois Cent. R. R. Co. v. Chicago, etc. Co., 26 Fed. 477	23
Murdock v. Memphis, 20 Wall. 590, 22 S. Ct. 429	30
North Coast Ry. Co. v. Nor. Pac. Ry. Co., 48 Wash. 529, 94 Pac. 112	18, 32
Northern Pac. R. R. Co. v. St. Paul, etc., 3 Fed. 702	23
Northern Pac. R. R. Co. v. Spokane, 64 Fed. 506	23
Northern Pac. Ry. Co. v. Townsend, 190 U. S. 267	20
Railway Company v. Alling, 99 U. S. 463	12, 19
Sauer v. New York, 206 U. S. 536, 27 S. Ct. 686	29
Sinking Fund Cases, 99 U. S. 700	14
Southern Pac. Co. v. Hyatt, 132 Cal. 240, 64 Pac. 272	17
Union Pac. Ry. Co. v. Burlington & M. R. R. Co., 3 Fed. 106	23
Union Pac. R. R. Co. v. Laramie Stock Yards, 231 U. S. 190	15
Union Pac. R. R. Co. v Leavenworth Ry. Co., 29 Fed. 728	10, 22
Union Pac. R. R. Co. v. Snow, 231 U. S. 204	15
United States v. D. & R. G. Ry., 150 U. S. 1	13
Williams v. Atlantic Coast Line R. Co., 17 Fed. (2nd) 17	17
Yazoo v. Mullins, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754	29

TABLE OF STATUTES CITED

	Page
Act of July 1, 1862 (12 Stat. 489)	5, 6, 7, 8, 10, 11, 16
Act of June 8, 1872 (17 Stat. 399)	13
Act of Mar. 3, 1875 (18 Stat. 482)	6, 10, 11, 12, 13, 14, 15, 19
Act of Mar. 3, 1877 (19 Stat. 405)	13
Act of June 24, 1912 (37 Stat. 138)	12, 15
Act of May 25, 1920 (41 Stat. 621)	16
Cal. Stat. 1850, p. 200	28
Cal. Stat. May 1, 1852, p. 150	8
Cal. Stat. 1855, p. 192	28
Cal. Stat. Apr. 4, 1864 (Stat. 1863-4, p. 344)	8
U. S. C. A. Title 28, sec. 344, pp. 299-301	30
Supreme Court Rule 27, subd 3	1

IN THE

Supreme Court of The United States

OCTOBER TERM, 1931.

NO. 258

CENTRAL PACIFIC RAILWAY COMPANY, a corporation, and SOUTHERN PACIFIC COMPANY, a corporation, *Petitioners and Appellants below,*

vs.

COUNTY OF ALAMEDA, a body politic and corporate, CHAS. W. HEYER, RALPH RICHMOND, JOHN F. MULLINS, REDMOND C. STAATS and WILLIAM J. HAMILTON, Members of the Board of Supervisors of said County, JOHN DOE CORPORATION, RICHARD ROE CORPORATION, JOHN SMITH, THOMAS BROWN, JAMES COE, JOSEPH HOE, EDWARD POE, ROBERT CROW and FREDERICK STOW, *Respondents and Respondents below.*

RESPONDENTS' BRIEF ON THE MERITS ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

I. THE FACTS

The facts upon which this litigation depends are set forth clearly, fairly and comprehensively in the opinion of the California Supreme Court (R., pp. 119-123, fol. 188-191, 81 Cal. Dec. 653-6, 299 Pac. 75-77). Consequently, and pursuant to the rule of this court (Supreme Court Rule 27, subd. 3), no further statement thereof is regarded necessary except to supply a deficiency in Petitioners' Brief.

In their statement of "The Facts" (Br., pp. 5-8),

petitioners have omitted all reference to the topographic conditions upon which respondent's case rests. And further, in the course of their argument (Br., p. 35) they advance the claim that it is not the fact that "the topography of Niles Canyon offers any serious obstacle to modern highway construction."

It is deemed necessary, therefore, to refer here to those portions of the Record portraying the rather unique geographical conditions which form the basis of respondents' claim to the occupation and use of a portion of the railroads' right of way for its public highway.

The trial court found (Finding No. V, R. 29, fol. 50) that the topographical, geographical and other physical features existing in the disputed portions of the right of way thru Niles Canyon,

> "viz: the narrowness of the canyon, proximity of Alameda Creek which in the winter season becomes a torrential stream sometimes capable of destroying bridges and roadways, and the steep sides of the canyon make it practically necessary to maintain the highway through the disputed territory because of the overwhelming difficulties to substitute a different route in those places where the road is within the 200 foot limit from the center line of main track of railroad."

It was further found that since 1911; respondent County has expended more than $100,000 for improvements and maintenance of the road (R., pp. 29, 30, fol.

51); and it is then concluded that the said highway "is necessary for public accommodation". (R., p. 30, fol. 51).

These findings are amply supported by the record. The difficulties incident to construction of a road outside the railroad right of way are depicted in the testimony of Mr. Posey, respondents' engineer (R., p. 85, fol. 134, et seq.). He stated in substance that while a road can be built most anywhere, steep hillsides, requiring lengthy cuts, long slopes, heavy embankments and many curves, resulting in slides, falling debris, settling, and damp surfaces, rendered the project in this instance "possible but not feasible" (R., p. 87, fol. 137). He further pointed out that the nearest alternative route would be approximately fifty per cent longer (R., p. 87, fol. 138). Moreover, that if the road were shifted entirely to the north side of the railroad, people on the south side of the canyon would have no way out and "probably would have to have two roads to allow people on both sides to go out." (R. p. 88, fol. 139). His rough estimate of the cost of a road up the canyon and outside the right of way, exculsive of bridges; was $125,000 for a gravel road (R. p. 89, fol. 141). Besides the financing of such a road, the element of safety to the public is a contributing factor rendering the project not feasible. (R. p. 95, fol. 149).

A glance at the Uuited States Geological Survey

topographic sheet of the Pleasanton Quadrangle, Defendants' Exhibit D, (inserted R. p. 84A, fol. 132a) shows that the floor of the canyon is in the neighborhood of 250 feet in elevation; that the walls are precipitous and rise to heights of 500, 750, 1000 and 1150 feet in a very short distance and to 1500 and 1660 feet further back.

Petitioners (Brief, pp. 7, 8) make light of the testimony of witnesses who stated they traveled the road thru Niles Canyon prior to the coming of the railroad, and wind up their presentation of the facts by a reference to that portion of Finding V of the trial court (R. p. 29, fol. 50) which declares that it cannot now be ascertained whether the 1859 survey is identical in any particular with the present highway. However, a preceding portion of the same finding reads (R. p. 29, fol. 49):

> ". . .that for more than sixty years there has existed with the knowledge of plaintiffs and their predecessors a highway for ordinary vehicular travel through Niles Canyon; but the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County road No. 4974, are a part of the present traveled road; . . . ."

The proceedings establishing the original road, designated County road No. 247, are set forth in the Re-

cord (pp. 61-2). The Board of Supervisors, after petition, survey and other preliminaries, on May 3, 1859, adopted the route and declared it a public highway, (R. p. 62, fol. 100) and the trial court so found (R. p. 29, fol. 49).

At that time the land involved was unappropriated public land of the United States (R. p. 27, fol. 46); and thereafter predecessors of petitioners acquired their right of way by the Act of Congress of July 1st, 1862, 12 Stat. 489 (R. p. 26, fol. 45). The railroad was actually constructed thru Niles Canyon in the years 1867 and 1868 (R. p. 27, fol. 46).

II. THE ISSUE

Petitioners state (Brief, p. 4) that the issue is merely one of title and right of possession, as to which of the parties has the superior right and control. Respondents insist that there is no question of superior right, the only question being whether the county has acquired an easement. A more accurate statement of the issue would be:

Can a railroad company, holding its right of way by virtue of a Congressional grant as a public trust, oust the public from the use thereof in disregard of the rights and conveniences of the latter, and this after sixty years of unmolested occupation by the public, which possession and use antedates that of the railroad,

where the public has expended considerable sums for construction, improvement and maintenance, and where the granting power in the first instance has expressly restricted the grant to provide for precisely such a public necessity as is presented here?

SUMMARY OF THE ARGUMENT

It is respondents' position that the County of Alameda established its highway in 1859, approximately eight years before the advent of the railroad, and has ever since been in continuous, uninterrupted and unmolested use of the same under a claim of right; that the Act of Congress of July 1, 1862 (12 Stat. 489) was not intended to interfere with the use of public roads, but, as affirmatively appears from later enactments and by judicial construction, was designed to further the public interest in respect to highways; that specifically, the Act of March 3, 1875 (18 Stat. 482), makes provision for joint use by railroads and public highways of canyons too narrow for the exclusive occupation of a 400 foot railroad right of way; that Congress at all times retained the power to alter, modify or qualify the title formerly conveyed in a manner not inconsistent with the use of the rights of way for railroad purposes; that independent of statute, the county, in the exercise of the police power of the state, might condemn unused portions of the right of way where the topographical conditions and the need warrants it; that neither Congress nor the Federal Courts have ever denied this

right, but, on the contrary, have so assumed; that the right to condemn existing, long adverse user on the part of the public will have the same result; that the requisite necessity has been shown in this case, with the result that the possession of the county has long since ripened into an easement.

Taking up the argument in the order followed in petitioners' Brief, the following propositions are urged:

1. Neither Congress, by the Act of July 1, 1862, nor the State of California, in urging and confirming the Congressional grant, contemplated the ousting of the public from highways already established.

2. The Act of July 1, 1862, (12 Stat. 489) was not an unqualified grant vesting a title wholly beyond the power of Congress to modify, and the railroad holds subject to the conditions of the Act of March 3, 1875.

3. The title of the railroad derived from the Act of July 1, 1862, is subject to public rights obtained through adverse user commensurate with the police power of the State.

4. The highway involved was established and has been in use since 1859; the necessity therefor is established; the United States Supreme Court will not undertake to examine a local question upon which the State Court has spoken.

ARGUMENT

I.

Neither Congress, by the Act of July 1, 1862, nor the State of California, in urging and confirming the Congressional grant, contemplated the ousting of the public from highways already established.

It is contended (Brief, pp. 11-15) that respondent County, being a political subdivision of the State of California, cannot be heard "in repudiation" of the acts of May 1, 1852 (Calif. Stat. 1852, p. 150) and April 4, 1864 (Calif. Stat. 1863-1864, p. 471), wherein the State Legislature first memorialized Congress to grant a right of way through the State for a transcontinental railroad, and later confirmed the grant.

If this argument were carried to its logical conclusion, these enactments would be construed as a renouncement of all local authority in or over the rights of way to be thereafter selected, and a veritable Chinese wall would have been authorized across the State. To give such effect to the Act of July 1, 1862, would surely be inconsistent with the purpose of the grant, since it was intended "to promote the public interest and welfare."

Neither Congress nor the State Legislature contemplated the taking of property already devoted to a public use. It would be manifestly absurd to say that the State, in urging and thereafter approving the grant in question, had any thought of thereby authorizing the

ousting of the public from its public highways if the grantee happened to select its route along them. Granting the urgent political and economic necessity existing at the time of these enactments, the State cannot be said to have surrendered her very sovereignty over strips of her lands to be selected according to the whim or desire of a railroad corporation. Since, as conceded by petitioners (Brief, pp. 13-14), those acts had no legal effect upon the property affected their obvious purpose was merely to add the voice of the State in approval of the Government's plan to give encouragement to a private enterprise by providing rights of way over lands within her borders. The benefit that California would derive from the construction of the contemplated railroad must have been apparent to the State Legislature. It was in furtherance of this project that the acts were passed. It would be a false interpretation of these measures, designed as they were to promote the welfare of the State, to construe them as limitations upon the right of its people to travel its highways.

It may be well to point out that both the State enactments here referred to were prior to selection or occupation of any locations by the grantee railroad, and so prior to the time when those concerned had any appreciation of the nature of the problems which such extensive land grants would raise.

The argument of absolute and exclusive ownership

of the lands acquired has been advanced before in a Federal Court and caused Mr. Justice Brewer to remark (*Union Pac. R-R. Co.* v. *Leavenworth Ry. Co.*, 29 Fed. 728) that even though it be conceded that Congress had the power to establish a line across the center of a State it is clear that the assertion of such power was not contemplated in the Pacific land grants. It would seem that in petitioners' view any intercourse between the residents of the northern part of the State, with those of the southern part involving any encroachment across or along the railroad grant which separates these regions, would not only be unlawful but also unpatriotic.

It is not repudiation of the early legislation referred to to urge that the State never disclaimed all power in relation to the rights of way involved. Nor is it repudiation to assert that the State never intended to make the rights and conveniences of the public subservient to the claim of the railroad to a title inviolable even as against other consistent or superior public uses.

II.

The Act of July 1, 1862, *was not an unqualified grant vesting a title wholly beyond the power of Congress to modify; and the railroad holds subject to the conditions of the Act of March* 3, 1875.

The grant itself contains an express reservation of the right of the Government to alter, amend or repeal in the following language (12 Stat. 489, 497, Sec. 17):

"Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend or repeal this act."

No doubt the legislative body deemed such a reservation necessary to permit it to provide for exigencies that it could not then foresee, but which it knew were bound to arise. In the exercise of such an extensive power as that of granting a strip of land across the continent, Congress must have realized that the rights of many individuals and many states, as well as those of the Federal Government itself, might become involved (as indeed the country's judicial history of the period following those grants has proven); and it was thought advisable to leave the way open to a future Congress to adjust the conflicting rights of the public and of individuals as against those of the grantee railroads when and if the need should develop.

It would seem a reasonable assumption that some such situation was brought to the attention of Congress in 1875, for in that year was enacted legislation which required railroad companies whose lines passed through narrow defiles to permit the use of their rights of way by public highways necessary for public accommodation. Following is the pertinent portion of the Act of March 3, 1875 (18 Stat. 482, Sec. 2):

"That any railroad company whose right of way . . . passes through any canyon, pass or defile, shall not prevent any other railroad company from the use and occupancy . . . And the location of

> such right of way through any canyon, pass or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; . . ."

It is not necessary to rely upon the letter of the above act to support the decision in the present case. Rather does the present decision rest upon the principle announced. It may be that the Act of 1875 should be construed as a legislative determination of the construction to be placed upon the grant of 1862, rather than a qualification of the title thereby conveyed.

No decisions have been found which construe the Act of 1875 in connection with a public highway upon a railroad right of way. Petitioners have referred (Brief, pp. 17-20) to two cases which, it is claimed, lend support to their contention that to apply the principle of the Act of 1875 would be to impair their vested title, a result obviously inconsistent with the intent as well as the power of Congress.

However, we do not understand the cases referred to to stand for the doctrine contended for. The first of these cases is *Railway Co.* v. *Alling,* 99 U. S. 463. That case involved a dispute between two railroad companies, each of which claimed prior rights in a certain canyon. To ascertain the respective rights of the rival

lines, this Court examined the Act of 1875 to determine what effect it had upon the earlier Act of 1872, under which latter legislation the Denver Company claimed. It was concluded that the Act of 1875, coming as it did at a time before the Denver Company had taken actual possession of the canyon (as it was required to do in order to perfect its claim) qualified and limited the earlier contingent grant in such manner as to make the Denver Company subject to the qualifications contained in the later act, so that the intervening rights of the other line were protected. The question presented in the instant case was expressly left undecided. Whatever significance that opinion might otherwise have had for this case is effectually eliminated by the following statement appearing at page 480, shortly following the language quoted by petitioners (Brief, pp. 18, 19):

> "This conclusion renders it unnecessary that we should, in this case, consider whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the Act of March 3, 1877, had that company actually located and constructed its road in or through the Grand Canyon within five years after the passage of the Act of June 8, 1872."

When a court disclaims any intention to pass upon a proposition it seems idle to speculate upon what its theory might have been.

The other case cited, *U. S.* v. *D. & R. G. Ry.*, 150

U. S. 1, appears to be even more remote from the present case, and nothing therein contained can be considered inconsistent with the interpretation of the Act of 1875 which respondents contend for. The only thing claimed to be pertinent there is the comment upon Mr. Justice Harlan's opinion in the Alling case (*supra*). It was merely pointed out that the granting act of 1872 and the subsequent enactment of 1875 were not inconsistent with each other (150, U. S. 8), and that the two acts could and should be read together, and that there was nothing in the Alling case inconsistent with such a construction.

Petitioners' "controlling principle" (Brief, p. 20), as stated by Mr. Chief Justice Waite in the *Sinking Fund Cases*, 99 U. S. 700, 719 (to the effect that Congress may not impair vested rights derived through its own enactments), is undisputed. However, it is not applicable here. It may be noted that its pronouncement there was merely preliminary to an exposition of its inapplicability to the facts there under review.

In the absence of any direct authority for the true construction to be given the Act of 1875, we may consider this Court's views in regard to a later act which likewise had the effect of further restricting the limited fee conveyed to certain railroads by one of the land grant acts. The Act of June 24, 1912, (37 Stat. 138) confirmed and validated conveyances theretofore made

by the Union Pacific Railroad Company, and also provided that thereafter persons claiming portions of the unused right of way by adverse possession for the period and of the character prescribed by the laws of the State involved should be permitted to acquire and perfect titles so acquired.

In *Union Pacific R. R. Co.* v. *Laramie Stock Yards*, 231 U. S. 190, and *Union Pacific R. R. Co.* v. *Snow*, 231 U. S. 204, this court held that in view of the express language of the statute validating agreements and conveyances already made whereby the railroad had alienated unused portions of its right of way, the act must be given retrospective operation, but that, in the absence of the expression of a similar intention as to the adverse possession provision, only such rights as had commenced to run after the effective date of the act were contemplated. In each of those cases the prescriptive period had not elapsed since the enactment, and consequently the judgments supporting the titles asserted were reversed.

It is apparent that the Act of 1912 had the effect of limiting or qualifying the earlier grant in a manner more detrimental to the railroad's interest than that of the Act of 1875, and that the later act was a direct qualification of the previous act. Consequently, in the case at bar, the State Supreme Court was justified in concluding that if Congress could in 1912 have placed a direct limitation upon the earlier grant, it surely could

have done so in 1875. The opinion (R. pp. 131-134, fol. 197-199, 81 *Cal. Dec.* 662-663, 299 *Pac.* 81-2) treats this proposition fully, and no good purpose would be served by pursuing it further.

Under petitioners' theory, if the railroad may voluntarily alienate unused portions of their rights of way, others may gain rights therein by adverse possession (Brief, pp. 23-26). If this be true, then admittedly Congress has by the Act of May 29, 1920 (41 Stat. 621) further restricted the grant of 1862. For it was there provided:

> ". . . That all railroad companies to which grants for rights of way through the public land have been made by Congress, or their successors in interest or assigns, are hereby authorized to convey to any state, county or municipality any portion of such right of way to be used as a public highway or street; . . ."

If Congress had the power to impose these burdens in 1912 and 1920, certainly it had the same power in 1875.

III.

The title of the railroad derived from the Act of July 1, 1862, is subject to public rights obtained through adverse user commensurate with the police power of the State.

The case at bar is not concerned with the lack of authority of a land grant railroad to divest itself of title to a portion of its right of way by deed, by abandonment or by dedication; nor is it concerned with the

right of an individual to acquire prescriptive title or easements in such property. It may be conceded that in each of those instances no encroachment will be permitted as against the railroad. By contrast, this case involves the *public* right to use so much of the railroad's right of way as may be reasonably necessary under the peculiar circumstances, both geographical and historical, of the case.

The authorities cited by petitioners (Brief, pp. 26-31) may be readily distinguished when these distinctions are kept in mind. Thus, *Southern Pac. Co.* v. *Hyatt,* 132 Cal. 240, involved only the right of an individual to acquire by adverse user. Any dictum in that case concerning public rights, while perhaps correct as an abstract proposition, can have little weight in view of the extraordinary facts of the instant case. The Texas case (*Heilbron* v. *St. Louis S. W. Ry. Co.,* 52 Tex. Civ. App. 575, 113 S. W. 613) dealt with no such necessity as appears in the present case. The same is true of *Williams* v. *Atlantic Coast Line R. Co.,* 17 Fed. (2nd) 17, and *Holland Co.* v. *Nor. Pac. R. R. Co.,* 208 Fed. 598, 214 Fed. 920.

It is respondents' contention that the public, through its established state and county government, has, when the requirements of public necessity demand and under its power of eminent domain, the right to condemn an unused portion of a railroad right of way obtained by

Congressional grant for a longitudinal encroachment; that the necessity has been shown in the present case; that, the right to condemn being established, the correlative right to acquire by adverse possession follows and is necessarily commensurate with the extent of the police power. The pronouncements of this court and other Federal courts are not only consistent with this view, but lend strong support to it, though no case identical in facts to the one at bar appears to have been decided in a Federal jurisdiction.

The single case on the proposition of a lateral or parallel encroachment on a land grant right of way appears to be one decided by the Supreme Court of Washington in 1908. (*North Coast Ry.* v. *Northern Pac. Ry. Co.*, 48 Wash. 529, 94 Pac. 112). There the plaintiff railway sought to place its track for a limited distance through a pass or canyon parallel to and along the right of way of the Northern Pacific, which latter road held a grant from Congress similar to that under which petitioners here derived their right of way. The Washington court considered and relied upon many of the cases cited in the opinion of the California court in the present case (R. pp. 125-130, fol. 193-196, 81 Cal. Dec. 658-9, 299 Pac. 78-80), and held as follows: (94 Pac. 114):

> "It is true the most, if not all, of the last-cited cases related to crossings of other railways . . . whereas the tract here sought . . . is a longitudinal tract about three-fifths of a mile in length, to be

carved out of claimant's right of way. The principle as to the power of eminent domain is, however, the same in both cases, depending upon the necessities of the occupying railroad and those of the public service . . . *It is therefore held here that the petitioner may invoke the power of eminent domain to acquire a longitudinal part of claimant's right of way if the showing as to the necessities of the two companies in the interest of the public service is sufficient to warrant it.*" (Emphasis ours.)

Petitioners have attempted to distinguish the above case (Brief, pp. 24-26) upon the ground that the Washington court erroneously assumed that the right of way grant through an Indian reservation was ineffective until 1885 (i. e., until subsequent to the Act of March 3, 1875), and that consequently and in accordance with the doctrine of the Alling case, *supra*, the Northern Pacific took subject to the provisions of the subsequent legislation requiring joint occupation. It is pointed out in this connection (Brief, p. 25) that decisions of this court, later in point of time to the Washington case, have held that these land grants are effective upon Indian lands. But this is beside the point in view of the positive declaration in the above quoted excerpt. Moreover, as showing that the court placed no reliance upon the subsequent qualifying statute, the following statement is significant (94 Pac. 115):

"With this view it is unnecessary to examine the questi[on] discussed in the briefs as to whether the act of [1875] being subsequent to that granting the right o[f way], applies here."

The distinction respondents here urge between the rights of individuals to acquire rights in and over railroad rights of way has been clearly recognized by this court. In *Northern Pacific Railway Co.* v. *Townsend,* 190 U. S. 267, the court was at pains to explain that what was there said concerning the refusal to recognize the right of an individual to possession for private purposes had no application to the rights of the public under similar circumstances. In order that this proposition be clearly understood, it was said (190 U. S. 272):

> "Of course, nothing that has been said in any wise imports that a right of way granted through the public domain within a State is not amenable to the police power of the State. Congress must have assumed when making this grant, for instance, that in the natural order of events as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

In *Holland Co.* v. *Northern Pacific Ry. Co.,* 208 Fed. 598, the District Court in eastern Washington discussed the Townsend case, *supra,* and pointed out that (208 Fed. 602):

> ". . . it was not denied that the right of way granted through the public domain within a state was amenable to the police power of the state, . . ."

In confirming this decision the Circuit Court of Appeal for the Ninth Circuit made the following observations (*Holland Co.* v. *Northern Pac. Ry. Co.*, 214 Fed. 920, 926):

> "Public use implies an underlying necessity, and the fundamental consideration, therefore, is that of superior need . . . The needs to which the railroad company's right to exclusive possession must yield are such only as arise out of, or are connected with, the maintenance of the right of way and the operation of a continuous line of railroad thereon. In other words, the railroad company is authorized to make, and may be compelled to make, reasonable provision for those needs only which it is instrumental in creating, or which inhere in the very nature of an unbroken right of way."

The court proceeds to discuss the impossibility of condemning a portion of a railroad right of way for such uses as erection of a public building. In considering the opinion, it should be borne in mind that the question before the court was whether or not a public street through the flat lands of a townsite could be maintained along the railroad right of way. The question of public accommodation and necessity at issue in the present case was not presented. The court goes on to say (214 Fed. 926):

> "Upon the one hand, the implication is clear that Congress intended that the right of way should be held and used exclusively for railroad purposes, and upon the other, it is fair to assume, it was not desired that the use be in disregard of the rights and convenience of those who should take up their abode along its course. It must have been contem-

> plated that highway and other crossings would, in the very nature of things, be required, and in view of the self-evident need therefor, together with what must have been a common and well-understood practice of making provision for them in railroad operation, it is reasonable to suppose that the grant was made with the implied consent that ways of necessity, both public and private, might be laid out across the right of way at such places and under such conditions as would not unreasonably impair its usefulness for the purpose for which it was created."

Petitioners have said (Brief, p. 26) that this case "denies the power of the railway company to alienate a longitudinal strip of its congressional right of way for highway purposes." However, bearing in mind the physical facts and conditions heretofore adverted to in the Holland case as distinguished from those existing in the present case, the following passage in the opinion is highly significant (214 Fed. 926-7):

> "We do not say that a case is inconceivable where, for a limited distance, some concession may not properly be made for this or an analogous purpose; but the necessity must be great and the conditions unusual in the extreme to warrant it."

Upon the general proposition that the state may condemn a railroad right of way when required for public convenience and necessity, the following cases are believed to establish such right:

Union Pacific Railway Company vs. *Leavenworth*, 29 Fed. 728, wherein it is held that the plaintiff railroad company's right of way is not beyond the reach

of the State's power of eminent domain proceedings in the State courts;

Illinois Central Railroad Company vs. *Chicago, etc. Company*, 26 Fed. 477, wherein the plaintiff railroad's contention that it held its right of way grant as a public trust protected from the state's right of eminent domain was declared untenable;

Union Pacific Railway Company vs. *Burlington & Missouri Railroad Company, et al.*, 3 Fed. 106, wherein the court held that even though the railroad right of way grant should be conceded to be the land of the United States, it would be subject to the state's power of eminent domain;

Northern Pacific Railroad Company vs. *St. Paul, etc.*, 3 Fed. 702, wherein it was held that a charter granted to a railroad company by the United States government does not exempt its right of way from the operation of the laws of the state relative to eminent domain;

Northern Pacific Railroad Company vs. *Spokane*, 64 Fed. 506, wherein the court further extends this doctrine by holding that the railroad company claiming under a federal grant right of way could dedicate to the public all rights that the public might acquire by condemnation.

In view of the finding of the trial court in the case at bar to the effect that "the said highway through

Niles Canyon is necessary for public accommodation" (R., p. 30, fol. 51), and also the statement in the opinion of the State court that (R., p. 129, fol. 195, 81 Cal. Dec. 660, 299 Pac. 80),

> "the findings and the evidence show beyond question an imperative necessity for the Niles Canyon highway, because besides furnishing the sole means of ingress to the property situate along the railroad within the canyon, it serves as the only feasible way of uniting two important and well-populated regions of the state, and therefore is vital to their development and progress"

petitioners' criticism of the State court's opinion (Brief, p. 27) would seem unjustified.

Since the State of California and its duly authorized agencies must be conceded to possess the right to condemn for crossing purposes, and since it is evident that to restrict the public in this respect would be intolerable, it is submitted that the extension of this conceded doctrine to include longitudinal rights of way for highway purposes for limited distances only in those regions where the topography of the country makes it necessary for the public convenience that roads exist, is not a very great or unreasonable step. No departure from established law is involved. Indeed, the courts, in considering the general doctrine with relation to crossings, have foreseen and expressly provided in their opinions for the situation now presented by declaring, as above shown, that under proper circumstances longitudinal rights of way may be acquired. The same

fundamental principle which has moved the courts to read into the federal land grants a right whereby the states may condemn so much of the land given as may be necessary for crossings, requires that longitudinal rights of way be recognized where the facts justify it.

Particularly in a case such as the present will the court hesitate to announce a rule that will have the effect of isolating populous communities from each other. It will be noted that the cases last cited had to do with instances where it was sought to *acquire* rights in railroad rights of way, whereas here respondents have not initiated any proceedings looking to the acquisition of rights, but are merely seeking to maintain and defend rights that have been continuously exercised as such for a long period of time (since 1859) and which rights were not only prior in time to the occupation by the railroad (1867-8), but also prior to the granting act (1862).

After all, a longitudinal encroachment of the nature required in the case at bar does not differ in principle from a crossing. It might be termed a lateral crossing, as distinguished from the usual right angle crossing. The right of the public to travel from one terminus to another is exactly the same, and the public necessity quite as great. The right in either case is measured by the necessity of the public and not by the extent of the encroachment, so long at least as due regard is had for the necessities of the railroad.

While petitioners refrain from a direct declaration that the highway has interfered with the use of their right of way for railroad purposes, they convey that idea in calling attention to its proximity in certain places to their tracks (Brief, pp. 4 and 23). However, in proof of the lack of any disposition on the part of respondents to interfere with railroad operations, attention is directed to the abandonment proceedings of 1911, by which the county moved a considerable section of its roadway across the creek and off of the right of way. A comparison of Plaintiff's Exhibit No. 6 (inserted in the Record opposite p. 40), which shows the situation as of the time of trial (R. p. 40), with Defendant's Exhibit "D" (inserted opposite R., p. 84), shows this change just west of the location marked "Brightside" on the latter map.

It is submitted, therefore, that upon the theory of public necessity and public policy alone, respondents have acquired and are entitled to retain occupancy of the property in dispute, so long as the public use for highway purposes continues.

IV.

The highway involved was established and has been in use since 1859; *the necessity therefor is established; the United States Supreme Court will not undertake to examine a local question upon which the State court has spoken.*

Proceedings incident to locating, surveying, laying

out and adopting the disputed highway are set forth in the Record (pp. 54-62, fol. 90-100); and the trial court found (R. pp. 28-29, fol. 49-50):

> "... that the highway ... has existed in the location described since the year 1911, with the exception of a line change ...; that said road as it existed prior to said line change is known and identified as county road survey No. 4974; that said road has been in constant use for vehicular travel by the public continuously since the year 1911; that the said Niles Canyon through which said road No. 4974 extends is narrow and rugged; that in the year 1859 defendant Alameda County surveyed and laid out through the said Niles Canyon, under Survey No. 247, a county road which was in the same year declared by the Board of Supervisors of said county to be a public highway; ... that for more than sixty years there has existed with the knowledge of plaintiffs and their predecessors a highway for ordinary vehicular travel through Niles Canyon ..."

The proceedings taken in 1911 to change the course of the road appear in the Record (pp. 101-105, fol. 158-166); and likewise those in reference to certain slight changes made in 1865 (R. pp. 106-107, fol. 167-170).

Petitioners (Brief, pp. 35-38) dispute the fact that a road was ever opened along the line of the original survey, basing their claim upon the assertion that the latter was located entirely on the northern side of the creek, whereas the evidence establishes the presence of four crossings as early as 1904. Respondents suggest,

however, that the above findings, together with the following, are, at this stage of the case, conclusive (R., p. 29, fol. 50):

> ". . . the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 not expressly abandoned by the Board of Supervisors on said date and now included within the limits of County road No. 4974, are a part of the present traveled road . . ."

Furthermore, respondents do not understand that this court will consider the alleged error (designated number 5, Brief, p. 9) in view of the fact that the question whether Alameda County had ever established the Niles Canyon road as a public highway is patently a local issue upon which the State court has passed. In addition to the statement quoted in Petitioners' brief (p. 37), the State court, after stating the facts relative to the establishment of the road in question, held (R., p. 122, fol. 191, 81 Cal. Dec 656, 299 Pac. 77):

> "The proceedings above mentioned substantially complied with the requirements of the earlier statutes under which public highways were established (Stats. 1850, p. 200; Stats. 1855, p. 192); . . ."

The United States Supreme Court will examine the entire record, but state questions will be left to the decision of state courts in cases coming from those

courts. (*Yazoo, etc., Co.* v. *Mullins,* 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754.)

In *Donahue* v. *Vosper,* 243 U. S. 59, 37 S. Ct. 350, 61 L. Ed. 592, an action to quiet title, it was decided that the decision of a Michigan court was essentially a local question, involving an estimate of the evidence concerning the conduct of the parties, and that after disposing of that court's construction of a Federal decision respecting the same lands, the Supreme Court would not undertake to review other errors.

In *Sauer* v. *New York,* 206 U. S. 536, 27 S. Ct. 686, it was contended that a certain statute authorizing an obstruction sought to be enjoined was unconstitutional. The State court held that plaintiff had no remedy as against the public, and this court held such ruling to be binding upon it. After stating the contention that the state law denied plaintiff rights secured to him by the Federal Constitution, it was said (27 S. Ct. 688):

> "This contention presents the only question for our determination, and the correctness of the principles of local land law applied by the state courts is not open to inquiry here, unless it has some bearing upon that question."

And further (idem, p. 689):

> ". . . in defining the appellate jurisdiction the Chief Justice (Marshall, in *Cohen* v. *Virginia,* 6 Wheat. 264, 5 L. Ed. 257) expressly limited it to questions concerning the Constitution, laws, and treaties of the United States, commonly called

> Federal questions, and excluded altogether the thought that, under the congressional regulation, the jurisdiction included any power to correct any supposed error of the state courts in the determination of state law . . . It is enough to refer to *Murdock* v. *Memphis,* 20 Wall. 590, 22 S. Ct. 429, where, after great consideration, it was held that under the judiciary act, as amended to its present form, this court was limited to a consideration of the Federal questions named in the Constitution. This court, whose highest function it is to confine all other authorities within the limits prescribed for them by the fundamental law, ought certainly to be zealous to restrain itself within the limits of its own jurisdiction, and ought not be insensibly tempted beyond them by the thought that an unjustified or harsh rule of law may have been applied by the state courts in the determination of a question committed exclusively to their care."

Other cases upon the same proposition are collected in the note to Section 344 of Title 28, U. S. C. A., pp. 299-301.

Even though petitioners are not concluded by the findings and this court were to go into the merits of this assignment of error, it is believed that the assignment is unfounded.

The fact that there were several crossings of Alameda Creek in 1904 does not prove that the original survey, being entirely upon one side thereof, was not laid out as surveyed. The proceedings for relocation of the road had in 1865 (R., pp. 106-107, fol. 167-

170) indicate that alterations involving new crossings might well have been contemplated. The report of the surveyor states (R. p. 107, fol. 170):

> "The plat indicates the principal difficulties of the route, which runs most of the way, over table land above ordinary high water; except at the Creek crossings, which present nearly the same facilities for fording as heretofore."

It is quite evident that the previous route was not remote from the creek. The petition for relocation (R., p. 106, fol. 167) recites:

> "If a road was made upon the present surveyed route it would be destroyed by the first rise of the creek."

Petitioners' reference to the testimony of one of the old residents (Brief, p. 8) is to the effect that travel at certain points was "in the creek bed mostly." Mr. Buttner, another old resident stated (R., p. 77, fol. 124) that in the winter the flood waters sometimes caused closing of the road.

These witnesses traveled the road as early as 1862 or 1863 (R., p. 62, fol. 101, and R., p. 71, fol. 114). In view of the fact that their recollection places the road on the floor of the canyon and in or near the creek bed, there is nothing inconsistent with the idea that travel over the route originally surveyed may gradually have diverged slightly from the path originally outlined in order to avoid high water, fallen trees or other ob-

stacles. These changes, together possibly with others that were deemed desirable, later were coverd by the abandonment proceedings.

Petitioners' criticism (Brief, pp. 33-34) of the State court's reference to a "way of necessity" is wholly unjustified. It seems obvious that the technical doctrine of ways of necessity was not at all within the contemplation of the court. The only necessity the opinion is concerned with is that of the public, upon the basis of which an exercise of the power of eminent domain was held to be justified.

Petitioners' assertion (Brief, p. 35) that the topography of Niles Canyon in fact offers no obstacle to modern highway construction is met by the finding of the trial court heretofore referred to (R., p. 30, fol. 51), to the effect that "said highway through Niles Canyon is necessary for public accommodation." It must be apparent that, conceding that a road *could* be built along the walls of the canyon, such construction is possible but not feasible. As indicating what degree of necessity is requisite in matters of this kind, reference is again made to the Washington decision (*North Coast Ry.* v. *No. Pac. Ry. Co., supra*), where it was claimed that a sufficient showing on this point had not been made (94 Pac. 115):

> "It is true it is not shown to be impossible to construct . . . a line . . . on . . . claimant's right of way if a sufficient amount of money is ex-

pended and the increased dangers are not considered. It does appear, however, that it is not reasonably practicable to adopt either of the routes proposed by claimant when all the surroundings are considered . . . A reasonable public necessity is all that is required to authorize the condemnation of property devoted to a public use."

CONCLUSION

Petitioners are seeking equitable relief against the continued use by the public of a portion of their right of way solely upon the theory that the strip of land they claim is held by the railroad in a sort of rigid trust which prevents them from alienating title or being divested of the same in any manner whatsoever. Even assuming this proposition to be true, it would seem that the proper party to object to any encroachment upon the right of way, so long as it did not interfere with the use of the same for railroad purposes, would be the Federal Government for whom the railroad holds in trust. No complaint has been heard from the Federal Government. On the contrary, it would appear that the United States has recognized through its courts the necessity of permitting encroachments of the kind objected to in this case. In any event, respondents submit, that even if there were no road existing in Niles Canyon at the present time, the County of Alameda could, upon its showing of public convenience and necessity, condemn a right of way across and along the strip claimed by petitioners, such condemnation to be based upon the broad principle of

public policy and the police power of the State. Since this right to condemn exists, it follows that the claim of the railroad to the right of exclusive occupancy must fail, and the County of Alameda has acquired and is now entitled to an easement in the property in dispute.

It is respectfully submitted that no sufficient grounds for review of the proceedings of the State courts has been shown, that the decision of the latter should be affirmed, the Writ of Certiorari discharged and the present proceedings in this Court dismissed.

EARL WARREN,
District Attorney of the County of Alameda, State of California,

RALPH E. HOYT,
Chief Assistant District Attorney of the County of Alameda, State of California,

JAMES H. OAKLEY,
Deputy District Attorney of the County of Alameda, State of California,

T. P. WITTSCHEN,
Attorneys for Respondents.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 258.—October Term, 1931.

Central Pacific Railway Company and Southern Pacific Company, Petitioners, *vs.* County of Alameda, Chas. W. Heyer, Ralph Richmond, et al., etc.	On Writ of Certiorari to the Supreme Court of the State of California.

[February 15, 1932.]

Mr. Justice Sutherland delivered the opinion of the Court.

Petitioners brought this suit against respondents in a state superior court to quiet their title to certain lands lying within Alameda County, California. The bill alleges that the lands described constitute parts of the right of way granted by the acts of Congress approved July 1, 1862, and July 2, 1864 (c. 120, 12 Stat. 489; c. 216, 13 Stat. 356), to the Central Pacific Railroad Company, predecessor in interest of the Central Pacific Railway Company, and leased to the Southern Pacific Company; that the County of Alameda and the other defendants, without the permission or consent, and against the will of petitioners, and without right or legal authority, had been and were then using the lands for highway or road purposes and thereby wrongfully excluding petitioners therefrom. To this bill respondents filed an answer and cross-complaint, denying some of the allegations of the bill, admitting others, and alleging affirmatively that the County of Alameda was the owner of the described lands, and was in possession and entitled to the possession thereof.

The trial court found that three of the described parcels, held in fee by the Central Pacific Railway Company, were subject to an easement in favor of the county to maintain an existing right of way for highway purposes. A decree, entered accordingly, was affirmed by the state supreme court. — Cal. —.

An abridged statement of facts found by the trial court and set forth at length in the opinion of the state supreme court follows.

A public highway between Niles and Sunol, through and along the bottom of Niles Canyon, was laid out and declared by the county in 1859, and ever since has been maintained. During that time it has served as one of the main arteries of travel between the bay regions of southern Alameda County and the Livermore Valley. In establishing the highway, the county acted by authority of, and in compliance with, the requirements of state statutes then in force. That portion of the canyon containing the segments of the highway here in question is narrow, deep, and rugged, and through it runs the Alameda Creek. Steep cliffs make it impracticable to maintain a highway through the canyon except along the bottom thereof. In pursuance of the act of Congress of 1862, *supra*, granting a right of way four hundred feet wide across the public lands to the Central Pacific Railroad Company, the company designated as part of its right of way the route through Niles Canyon, which right of way, on account of the narrowness of the canyon, embraced part of the land occupied by the highway. A single track railroad was completed in 1868, over which trains have since been operated, but thereby the free use of the highway never has been interfered with.

About the years 1910-1911, owing to the effect of flood waters, a part of the highway was moved from one side of the creek to the other and beyond the railroad right of way, the discontinued portions being formally abandoned. When this suit was begun, the highway was within the right of way for stretches of about one-half a mile at the westerly end of the canyon, about one mile and a half at the easterly end, and for a short distance between the two. The physical conditions of the canyon are such as to render the use of the lands over these stretches for highway purposes a practical necessity. In reconstituting the highway in 1910-1911, the line of the then existing road was substantially followed, except for the abandoned portions.

The trial court found that "the said highway did not exist throughout in its present location hereinabove particularly described prior to March 27, 1911, but that these parts of the old road No. 247 [the road of 1859] not expressly abandoned by the

Board of Supervisors on said date and now included within the limits of County road No. 4974 [the road of 1910-1911], are a part of the present traveled road." The testimony of witnesses in respect of the identity of these parts of the new and the old roads is meager and leaves much to be desired in the way of certainty, as, owing to the great lapse of time, well might be expected. But that a road through the canyon was laid out and established in 1859, under and in accordance with the state law, and was thereafter used by the public, is not open to serious controversy, although the point is urged that the present road departs from the line of that first established. The original road was formed by the passage of wagons, etc., over the natural soil, and we know, as a matter of ordinary observation, that in such cases the line of travel is subject to occasional deviations owing to changes brought about by storms, temporary obstructions, and other causes. But, so far as the specific parcels of land here in dispute are concerned, we find nothing in the record to compel the conclusion that any departure from the line of the original highway was of such extent as to destroy the identity of the road as originally laid out and used. Even in the case of highways sought to be established by prescription, where the user must be confined to a definite line, slight deviations are not regarded as material. *Nelson* v. *Jenkins*, 42 Neb. 133, 137; *Burleigh County* v. *Rhud*, 23 N. D. 362, 364; *Moon* v. *Lollar*, 203 Ala. 672; *Gentleman* v. *Soule*, 32 Ill. 271, 278; *Bannister* v. *O'Connor*, 113 Iowa 541, 543.

Here the question is not whether there had been such deviations from the original line of travel as to negative the claim that a road had been brought into existence by prescription, but whether there had been such substantial departures from portions of the line of the road established in 1859 as to constitute an abandonment of those portions of that road, and the substitution, *pro tanto*, of a new one so removed in location as to cause it to depend for its legality not upon the original establishment but upon independent facts and considerations. The burden of sustaining the affirmative of this proposition plainly rests upon the party who asserts it, since proof of the establishment of a road raises a presumption of its continuance. That is to say, the respondents having shown the establishment by the county of a road

through Niles Canyon in 1859, the continuing identity of that road must be presumed until overcome by proof to the contrary, the burden of which rests upon the petitioners. *Barnes* v. *Robertson*, 156 Iowa 730, 733; *Beckwith et al.* v. *Whalen*, 65 N. Y. 322, 332; *Eklon* v. *Chelsea*, 223 Mass. 213, 216; *Taeger* v. *Riepe*, 90 Iowa 484, 487; *Town of Oyster Bay* v. *Stehli*, 169 App. Div. (N. Y.) 257, 262. This is in accordance with the general principle that a condition once shown to exist is presumed to continue. In the light of this presumption, and the absence of evidence clearly contravening it, we cannot say that the findings below are wholly without support. The conclusion follows that the portions of the highway now in question, prior to the grant of the railroad right of way of 1862, formed part of a legally constituted public road, which, since its establishment in 1859, has been in continuous use. In this view, the decree below must be affirmed upon principles settled by this court in respect of cognate cases.

By the Act of July 26, 1866, c. 262, 14 Stat. 251-253, Congress dealt with the acquisition of a variety of rights upon the public domain. By §§ 1-7, mineral lands, whether surveyed or unsurveyed, are opened to exploration and occupation, subject to regulations prescribed by law, and to the local customs and rules of miners in the several districts. Section 8, the one with which we are here concerned, provides "That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." By § 9, it is provided that rights to the use of water for mining, agricultural, or other purposes, which have vested and accrued and are recognized and acknowledged by local customs, laws, etc., shall be maintained and protected; "and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

In *Broder* v. *Water Co.*, 101 U. S. 274, this court had § 9 under consideration. It there appeared that the water company owned a canal for conducting and distributing water for mining, agricultural, and other uses. The canal was completed in 1853, and thereafter was in constant operation, and uniformly acknowledged and recognized by the local customs, laws, and decisions of the courts of California. Until the passage of the act of 1862, *supra*, the land through which the canal ran was the public property of

the United States. A portion of it was included in the grant of lands made by that act to the railroad company from which Broder derived his title to a tract traversed by the canal. He brought suit against the water company to have the canal declared a nuisance and abated, and to recover damages. This court held that, notwithstanding the fact that Broder's title antedated the act of 1866, that title, nevertheless, was subject to the right of way for the canal. Upon that matter it was said:

"It is the established doctrine of this court that rights of . . . persons who had constructed canals and ditches . . . are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one."

The court then, referring to the clause in § 4 of the Act of July 2, 1864, *supra*, reserving from defeat or impairment by the general terms of the grant of 1862, "any pre-emption, homestead, swamp-land, *or other lawful claim*," said that all such reservations were to be construed in the light of the general principle that Congress, in making the donations, could not be supposed to do so "at the expense of pre-existing rights, which, though imperfect, were still meritorious, and had just claims to legislative protection."

Leavenworth, etc., R. R. Co. v. *United States*, 92 U. S. 733, involved a grant to the State of Kansas of lands to aid in the construction of specified railroads; and the question was whether the grant included lands dedicated to, and occupied by, the Osage Indians. The grant was subject to a proviso reserving to the United States all lands theretofore reserved for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever. It was held that this proviso had the effect of excluding the Indian lands from the operation of the grant. The court, at p. 746, said:

"It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent."

And the court added:

"What ought to be done, has been done. The proviso was not necessary to do it; but it serves to fix more definitely what is granted by what is excepted."

Likewise, this court has recognized that the appropriation of mineral lands upon the public domain in accordance with the local customs of miners, prior to Congressional legislation, was assented to by the silent acquiescence of the government, and was entitled to protection. See *Atchison* v. *Peterson,* 20 Wall. 507, 512; *Sparrow* v. *Strong,* 3 Wall. 97, 104; *Jennison* v. *Kirk,* 98 U. S. 453, 458; *Northern Pacific Railroad* v. *Sanders,* 166 U. S. 620, 634.

In *Jennison* v. *Kirk, supra,* at page 459, referring to the act of 1866, this court quoted approvingly the statement of the author of the act, that "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached."

As far back as 1855, the Supreme Court of California, in an opinion which received the approval of this court in *Atchison* v. *Peterson, supra,* said:

"In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undisgested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata.* Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development." *Irwin* v. *Phillips,* 5 Cal. 140, 146.

Finally, in *Cramer* v. *United States,* 261 U. S. 219, it was held that public lands in the actual occupancy of individual Indians since before 1859, were excepted from the railroad grant of lands made by the Act of July 25, 1866, c. 242, 14 Stat. 239. This holding was based upon the well understood governmental policy of encouraging the Indian to forego his wandering habits and adopt those of civilized life; and it was said that to hold that by so doing he acquired no possessory rights to the lands occupied, to which the government would accord protection, would be contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation. "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy. *Broder* v. *Water Co.,* 101 U. S. 274, 276, furnishes an analogy."

The present case is controlled by the same general principles. We cannot close our eyes to the fact that long before the act of 1866, highways in large number had been laid out by local, state and territorial authority, upon and across the public lands. The practice of doing so had been so long continued, and the number of roads thus created was so great, that it is impossible to conclude otherwise than that they were established and used with the full knowledge and acquiescence of the national government. These roads, in the fullest sense of the words, were necessary aids to the development and disposition of the public lands. Compare *Flint & P. M. Ry. Co.* v. *Gordon,* 41 Mich. 420, 428-429; *Town of Red Bluff* v. *Walbridge,* 15 Cal. App. 770, 778-9. They facilitated communication between settlements already made, and encouraged the making of new ones; increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads is so apparent, and are their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against destruction or impairment as a result of subsequent grants follows as a rational consequence. The section of the act of 1866 granting rights of way for the construction of highways, no less than that which grants the right of way for ditches and canals, was, so far as then existing roads are concerned, a voluntary recognition and confirmation of preexisting rights, brought into being.

with the acquiescence and encouragement of the general government.

It follows that the laying out by authority of the state law of the road here in question created rights of continuing user to which the government must be deemed to have assented. Within the principle of the decisions of this court heretofore cited, they were such rights as the government in good conscience was bound to protect against impairment from subsequent grants. The reasons for so holding are too cogent to be denied. When, under that grant, the railroad company designated its right of way and built its line, it must be held to have done so with knowledge of the existence of the highway and subject to its continued maintenance and use.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.